This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

Digitized by Google

HARVARD LAW SCHOOL
LIBRARY

Digitized by Google

Digitized by Google

Digitized by Google

UNITED STATES CIRCUIT COURTS OF APPEALS REPORTS

WITH ANNOTATIONS

WITH TABLE OF CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED

VOLUME 82

LAWYERS' CO-OPERATIVE PUBLISHING CO.
ROCHESTER
1907

Digitized by Google

COPYRIGHT, 1907,
BY
LAWYERS' CO-OPERATIVE PUBLISHING CO.

JAN 27 1908

82 C.C.A.

Digitized by Google

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

FIRST CIRCUIT.

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge.....Providence, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. FRANCIS C. LOWELL, Circuit Judge.....Boston, Mass.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. FREDERIC DODGE, District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT.

Hon. RUFUS W. PECKHAM, Circuit Justice.....Washington, D. C.
Hon. E. HENRY LACOMBE, Circuit Judge.....New York, N. Y.
Hon. WILLIAM K. TOWNSEND, Circuit Judge[1].....New Haven, Conn.
Hon. ALFRED C. COXE, Circuit Judge.....Utica, N. Y.
Hon. HENRY G. WARD, Circuit Judge[2].....New York, N. Y.
Hon. JAMES P. PLATT, District Judge, Connecticut.....Hartford, Conn.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. GEORGE B. ADAMS, District Judge, S. D. New York.....New York, N. Y.
Hon. GEORGE C. HOLT, District Judge, S. D. New York.....New York, N. Y.
Hon. CHARLES M. HOUGH, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. JAMES L. MARTIN, District Judge, Vermont.....Brattleboro, Vt.

THIRD CIRCUIT.

Hon. WILLIAM H. MOODY, Circuit Justice.....Washington, D. C.
Hon. GEORGE M. DALLAS, Circuit Judge.....Philadelphia, Pa.
Hon. GEORGE GRAY, Circuit Judge.....Wilmington, Del.
Hon. JOSEPH BUFFINGTON, Circuit Judge.....Pittsburgh, Pa.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. WILLIAM M. LANNING, District Judge, New Jersey.....Trenton, N. J.

[1] Died June 2, 1907.

[2] Appointed May 13, 1907.

Digitized by Google

Hon. JOSEPH CROSS, District Judge, New Jersey.....Elizabeth, N. J.
Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. ROBERT WODROW ARCHBALD, District Judge, M. D. Pennsylvania..Scranton, Pa.
Hon. NATHANIEL EWING, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice.....Washington, D. C.
Hon. NATHAN GOFF, Circuit Judge.....Clarksburg, W. Va.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
Hon. THOMAS J. MORRIS, District Judge, Maryland.....Baltimore, Md.
Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.....Raleigh, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Car..Charleston, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....Philippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....Bramwell, W. Va.

FIFTH CIRCUIT.

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge.....Atlanta, Ga.
Hon. A. P. McCORMICK, Circuit Judge.....Dallas, Tex.
Hon. DAVID D. SHELBY, Circuit Judge.....Huntsville, Ala.
Hon. THOMAS G. JONES, District Judge, N. and M. D. Alabama.....Montgomery, Ala.
Hon. OSCAR R. HUNDLEY, District Judge, N. D. Alabama.....Birmingham, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....Mobile, Ala.
Hon. CHARLES SWAYNE, District Judge, N. D. Florida[a].....Pensacola, Fla.
Hon. JAMES W. LOCKE, District Judge, S. D. Florida.....Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. EUGENE D. SAUNDERS, District Judge, E. D. Louisiana.....New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....Kosciusko, Miss.
Hon. DAVID E. BRYANT, District Judge, E. D. Texas.....Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.

SIXTH CIRCUIT.

Hon. JOHN M. HARLAN, Circuit Justice.....Washington, D. C.
Hon. HORACE H. LURTON, Circuit Judge.....Nashville, Tenn.
Hon. HENRY F. SEVERENS, Circuit Judge.....Kalamazoo, Mich.
Hon. JOHN K. RICHARDS, Circuit Judge.....Cincinnati, Ohio.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
Hon. HENRY H. SWAN, District Judge, E. D. Michigan.....Detroit, Mich.
Hon. LOYAL E. KNAPPEN, District Judge, W. D. Michigan.....Grand Rapids, Mich.
Hon. ROBERT W. TAYLER, District Judge, N. D. Ohio.....Cleveland, Ohio.
Hon. ALBERT C. THOMPSON, District Judge, S. D. Ohio.....Cincinnati, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....Columbus, Ohio.
Hon. CHARLES D. CLARK, District Judge, E. and M. D. Tennessee....Chattanooga, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

[a] Died July 5, 1907.

Digitized by Google

SEVENTH CIRCUIT.

Hon. WILLIAM R. DAY, Circuit Justice.....Washington, D. C.
Hon. PETER S. GROSSCUP, Circuit Judge.....Chicago, Ill.
Hon. FRANCIS E. BAKER, Circuit Judge.....Indianapolis, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. SOLOMON H. BETHEA, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois.....Urbana, Ill.
Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois.....Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
Hon. JOSEPH V. QUARLES, District Judge, E. D. Wisconsin.....Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin.....Madison, Wis.

EIGHTH CIRCUIT.

Hon. DAVID J. BREWER, Circuit Justice.....Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.
Hon. WILLIS VAN DEVANTER, Circuit Judge.....Cheyenne, Wyo.
Hon. WILLIAM C. HOOK, Circuit Judge.....Leavenworth, Kan.
Hon. ELMER B. ADAMS, Circuit Judge.....St. Louis, Mo.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....Little Rock, Ark.
Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....Denver, Colo.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....Cresco, Iowa.
Hon. SMITH McPHERSON, District Judge, S. D. Iowa.....Red Oak, Iowa
Hon. JOHN C. POLLOCK, District Judge, Kansas.....Topeka, Kan.
Hon. WM. LOCHREN, District Judge, Minnesota.....Minneapolis, Minn.
Hon. PAGE MORRIS, District Judge, Minnesota.....Duluth, Minn.
Hon. DAVID P. DYER, District Judge, E. D. Missouri.....St. Louis, Mo.
Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri.....Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska.....Omaha, Neb.
Hon. THOMAS C. MUNGER, District Judge, Nebraska.....Lincoln, Neb.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. JOHN E. CARLAND, District Judge, South Dakota.....Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

NINTH CIRCUIT.

Hon. JOSEPH McKENNA, Circuit Justice.....Washington, D. C.
Hon. WILLIAM B. GILBERT, Circuit Judge.....Portland, Or.
Hon. WM. W. MORROW, Circuit Judge.....San Francisco, Cal.
Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....San Francisco, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....San Francisco, Cal.
Hon. OLIN WELLBORN, District Judge, S. D. California.....Los Angeles, Cal.
Hon. FRANK H. DIETRICH, District Judge, Idaho.....Pocatello, Idaho.
Hon. WILLIAM H. HUNT, District Judge, Montana.....Helena, Mont.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, Or.
Hon. EDWARD WHITSON, District Judge, E. D. Washington.....Spokane, Wash.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....Seattle, Wash.

Digitized by Google

Digitized by Google

CASES REPORTED.

Page

Acme Food Co. v. Meier..... 208
Agnew, Fidelity & Deposit Co. v... 103
Allen, Sheridan v..... 522
American Can Co. v. Williams.... 628
American Fine Art Co. v. Simon.. 675
Ann J. Trainer, The..... 332
Armour Packing Co. v. United States 135
Armour & Co. v. Skene 385
Arts, In re..... 91
Arts v. Coder..... 91
Atchison, T. & S. F. R. Co. v. Hurley 453
Atlanta, K. & N. R. Co. v. Southern R. Co..... 256
Atwood, Goodlander - Robertson Lumber Co. v..... 109
Augusta Trust Co. v. Federal Trust Co. 309
A. Zanmati & Co. v. United States 626

Baer v. Sleicher..... 281
Bakley, Dillingham v. 659
Baltimore & O. R. Co., Fadley v... 464
Bayport, The..... 332
Beckham, Stanley v..... 304
Beebe v. Wells..... 285
Bell, Memphis Consol. Gas & Electric Co. v..... 25
Bennett, In re..... 531
Bettis v. Frederick Leyland & Co. 525
Biggs v. United States..... 180
Blodgett, Portland Chemical & Phosphate Co. v..... 77
Blood, Ferguson v..... 482
Board of Com'rs of Hertford County, N. C., v. Tome..... 215
Bonsall v. Platt..... 260
Bradley v. Lehigh Val. R. Co..... 426
Brock v. Fuller Lumber Co..... 402
Brown v. United States..... 318
Brown v. Wilmore Coal Co..... 295
Burch, Southern Pac. Co. v..... 34
Burditt & Williams Co. v. United States 201
Burns v. Cooper 300

Page

Butler v. New York Cent. & H. R. R. Co. 330
Byers, Carnegie Steel Co. v..... 115

Cain, Calhoun County Bank v..... 114
Calhoun County Bank v. Cain.... 114
Carlisle, Kinnear Mfg. Co. v..... 81
Carnegie Steel Co. v. Byers..... 115
Carr, Southern R. Co. v..... 240
Carrick, Old Colony Zinc & Smelting Co. v..... 347
Carson, Cole v. 408
Carter & Bro. v. Kirby Lumber Co. 14
Chapman, School Dist. No. 11, Dakota County, Neb., v..... 35
Chicago & N. W. R. Co. v. O'Brien 461
Chisholm, Lehigh Valley Transp. Co. v..... 562
Chisholm, The William..... 562
Chitwood v. United States..... 505
Choy Chong Woh & Co. v. United States 608
City of Cleveland, Tenn., Cunningham v. 55
City of Vicksburg, Vicksburg Waterworks Co. v..... 250
Clement v. Wilson..... 676
Coder, In re..... 91
Coder, In re..... 99
Coder v. Arts..... 91
Coder v. McPherson..... 99
Colby & Co., United States v. 629
Cole v. Carson..... 408
Continuous Glass Press Co. v. Schmertz Wire Glass Co..... 587
Cook, Hubbard v..... 508
Cooper, Burns v..... 300
Craft v. Schafer..... 349
Cudahy Packing Co. v. United States 135
Cumberland Coal & Coke Co. v. Gray 87
Cumberland Telephone & Telegraph Co., New Amsterdam Casualty Co. v..... 315
Cunningham v. City of Cleveland, Tenn. 55

Digitized by Google

Page

Curtin, Tucker v. 225

Dauntless, The 327
Dayton, Jarmuth v. 588
Dayton, Manson v. 588
Deere & Webber Co. v. Dowagiac Mfg. Co. 351
Delaware, L. & W. R. Co., Minard v. 586
De Noyelles, New York, N. H. & H. R. Co. v. 497
Dewees, St. Louis & S. F. R. Co. v. 190
Dickinson, Kean v. 667
Dillingham v. Bakley 659
Dr. Peter H. Fahrney & Sons Co. v. Ruminer 621
Dover, Gloucester Electric Co. v. 291
Dowagiac Mfg. Co., Deere & Webber Co. v. 351
Dresser, Worcester County Gas Co. v. 649
Dudley & Co. v. United States 627

Eads, The James B. 21
Ellis, The 112
Evenson v. Spaulding 263

Fadley v. Baltimore & O. R. Co... 464
Fahrney & Sons Co. v. Ruminer.. 621
Fanny Neil, The 21
Federal Coal & Coke Co., Hyams v. 324
Federal Ins. Co. v. Starin 657
Federal Trust Co., Augusta Trust Co. v. 309
Federation Shoe Co., In re 285
Ferguson, The 442
Ferguson v. Blood 482
Fidelity & Deposit Co. v. Agnew 103
Files v. Rankin 491
First Nat. Bank, Towle v. 520
Folmina, The 440
Frederick Leyland & Co., Bettis v. 525
Frederick Leyland & Co. v. Holmes 511
Frederick Leyland & Co., Johnson v. 526
Freeman v. Freeman 413
Fuller Lumber Co., Brock v. 402

Galicia, The 112
General R. Signal Co., Hall Signal Co. v. 653
Ginty v. New Haven Iron & Steel Co. 110
Gloucester Electric Co. v. Dover 291

Page

Golden Rod, The 345
Goodlander-Robertson Lumber Co. v. Atwood 109
Gray, Cumberland Coal & Coke Co. v. 87
Greenman, United Shoe Machinery Co. v. 581
Grobet, National Cash Register Co. v. 651

Hall Signal Co. v. General R. Signal Co. 653
Hanover Nat. Bank of City of New York v. Suddath 676
Hanover Nat. Bank of City of New York v. Suddath 677
Hartman, John D. Park & Sons Co. v. 158
Holmes, Frederick Leyland & Co. v. 511
Howes, Kentucky Coal, Timber, Oil & Land Co. v. 337
Hubbard v. Cook 508
Hughes, Western Real Estate Trustees v. 514
Hurley, Atchison, T. & S. F. R. Co. v. 453
Hyams v. Federal Coal & Coke Co. 324

Illinois Cent. R. Co., Moit v. 430

James B. Eads, The 21
Jarmuth v. Dayton 588
Jayne v. Loder 625
John D. Park & Sons Co. v. Hartman 158
Johnson v. Frederick Leyland & Co. 526
John W. Moore, The 21
Joseph Wild & Co. v. Provident Life & Trust Co. 516

Kean v. Dickinson 667
Kentucky Coal, Timber, Oil & Land Co. v. Howes 337
King, Marthinson v. 360
Kinnear Mfg. Co. v. Carlisle 81
Kirby Lumber Co., W. T. Carter & Bro. v. 14
Klosters Aktie Bolag, William H. Perry Co. v. 321
Knickerbocker Trust Co., Payne v. 350

Larkin, United States v. 247
Lehigh Val. R. Co., Bradley v. 426

Digitized by Google

Page
Lehigh Valley Transp. Co. v. Chisholm 562
Lestershire Lumber & Box Co. v. W. M. Ritter Lumber Co..... 527
Lestershire Lumber & Box Co., W. M. Ritter Lumber Co. v..... 529
Leyland & Co., Bettis v..... 525
Leyland & Co. v. Holmes..... 511
Leyland & Co., Johnson v..... 526
Loder, Jayne v..... 625

McCormick v. Solinsky..... 134
McLean, Thomson-Houston Electric Co. v..... 629
McPherson, Coder v..... 99
Manson v. Dayton..... 588
Manson v. Williams..... 475
Markell v. Matteson..... 518
Marthinson v. King..... 360
Matteson, Markell v..... 518
Meier, Acme Food Co. v..... 208
Memphis Consol. Gas & Electric Co. v. Bell..... 25
Miller v. Steele..... 572
Minard v. Delaware, L. & W. R. Co. 586
Moit v. Illinois Cent. R. Co..... 430
Montgomery Electric Light & Power Co., Westinghouse Electric Mfg. Co. v..... 636
Moore, The John W. 21
Moore & McFerrin, Reed v..... 434
Morris & Co. v. United States... 135
Murray v. Orr & Lockett Hardware Co. 445

National Cash Register Co. v. Grobet 651
National Enameling & Stamping Co. v. New England Enameling Co. 359
Neil, The Fanny..... 21
New Amsterdam Casualty Co. v. Cumberland Telephone & Telegraph Co. 315
New England Enameling Co., National Enameling & Stamping Co. v. 359
New Haven Iron & Steel Co., Ginty v. 110
New York Cent. & H. R. R. Co., Butler v. 330
New York, N. H. & H. R. Co. v. De Noyelles 497
Norfolk & W. R. Co., Rice v..... 447

Page
Oak, The 327
O'Brien, Chicago & N. W. R. Co. v. 461
O'Brien, Palatine Ins. Co., Limited, of Manchester, Eng., v..... 70
Oceanica, The..... 562
Ohio Valley Bank Co. v. Switzer 438
Old Colony Zinc & Smelting Co. v. Carrick..... 347
Old Nick Williams Co. v. United States 73
Orr & Lockett Hardware Co., Murray v. 445
Otis Steel Co. v. Wingle 62
Oxford & Coast Line R. Co. v. Union Bank of Richmond, Va... 609

Palatine Ins. Co., Limited, of Manchester, Eng., v. O'Brien..... 70
Parkinson, Standard Oil Co. v... 29
Park & Sons Co. v. Hartman.... 158
Payne v. Knickerbocker Trust Co. 350
Peeke, United States v. 340
People's Steamboat Co., Weems Steamboat Co. of Baltimore City v. 276
Perkins-Goodwin Co., Appeal of.. 343
Perry Co. v. Klosters Aktie Bolag 321
Peter H. Fahrney & Sons Co. v. Ruminer 621
Platt, Bonsall v. 260
Portland Chemical & Phosphate Co. v. Blodgett..... 77
Power Fuel Co., Southern R. Co. v. 65
Provident Life & Trust Co., Joseph Wild & Co. v..... 516

Rankin, Files v. 491
Reed v. Moore & McFerrin..... 434
Reis, The William E..... 21
Remington Automobile & Motor Co., In re 421
Rice v. Norfolk & W. R. Co. 447
Ritter Lumber Co. v. Lestershire Lumber & Box Co..... 529
Ritter Lumber Co., Lestershire Lumber & Box Co. v..... 527
Ruminer, Dr. Peter H. Fahrney & Sons Co. v..... 621

St. Louis Hay & Grain Co., Southern R. Co. v..... 614
St. Louis Southwestern R. Co. v. Wainwright 16
St. Louis & S. F. R. Co. v. Dewees 190
Sass & Crawford v. Thomas.... 19

Digitized by Google

Page
Schafer, Craft v. 349
Schmertz Wire Glass Co., Continuous Glass Press Co. v. 587
School Dist. No. 11, Dakota County, Neb., v. Chapman..... 35
Scows 8, 20, and 7, The..... 678
Scranton Cold Storage & Warehouse Co., Wills v. 355
Sheridan v. Allen..... 522
Simon, American Fine Art Co. v. 675
Skene, Armour & Co. v..... 385
Sleicher, Baer v. 281
Solinsky, McCormick v. 134
Southern Pac. Co. v. Burch..... 34
Southern R. Co., Atlanta, K. & N. R. Co. v..... 256
Southern R. Co. v. Carr..... 240
Southern R. Co. v. Power Fuel Co. 65
Southern R. Co. v. St. Louis Hay & Grain Co..... 614
Spaulding, Evenson v. 263
Spencer & Co. v. United States... 656
Sprinkle v. United States 1
Stamford, The..... 677
Standard Oil Co. v. Parkinson... 29
Stanley v. Beckham..... 304
Starin, Federal Ins. Co. v..... 657
Stearns v. United States..... 48
Steele, Miller v. 572
Suddath, Hanover Nat. Bank of City of New York v..... 676
Suddath, Hanover Nat. Bank of City of New York v..... 677
Swift & Co. v. United States..... 135
Switzer, Ohio Valley Bank Co. v. 438

Tenedos, The 671
Thomas, Sass & Crawford v..... 19
Thomson-Houston Electric Co. v. McLean 629
Tome, Board of Com'rs of Hertford County, N. C., v..... 215
Towle v. First Nat. Bank..... 520
Town of Nahant, Ex parte 470
Town of Nahant, United States v. 470
Trainer, The Ann J..... 332
Tucker, In re 225
Tucker v. Curtin 225

U. H. Dudley & Co. v. United States 627
Union Bank of Richmond, Va., Oxford & Coast Line R. Co. v..... 609
United Educational Co., In re.... 343

Page
United Shoe Machinery Co. v. Greenman 581
United States, In re..... 470
United States, Armour Packing Co. v. 135
United States, A. Zanmati & Co. v. 626
United States, Biggs v. 180
United States, Brown v. 318
United States, Burditt & Williams Co. v. 201
United States, Chitwood v..... 505
United States, Choy Chong Woh & Co. v. 608
United States v. Colby & Co..... 629
United States, Cudahy Packing Co. v. 135
United States v. Larkin..... 247
United States, Morris & Co. v..... 135
United States, Old Nick Williams Co. v. 73
United States v. Peeke 340
United States, Spencer & Co. v. 656
United States, Sprinkle v. 1
United States, Stearns v. 48
United States, Swift & Co. v..... 135
United States v. Town of Nahant 470
United States, U. H. Dudley & Co. v. 627
United States, Van Gesner v. 180
United States, Williamson v. 180

Van Gesner v. United States..... 180
Vicksburg Waterworks Co. v. City of Vicksburg 250
Violetta, The 678

Wainwright, St. Louis Southwestern R. Co. v. 16
Weems Steamboat Co. of Baltimore City v. People's Steamboat Co. 276
Weinreb, In re 439
Wells, Beebe v..... 285
Western Real Estate Trustees v. Hughes 514
Westinghouse Electric Mfg. Co. v. Montgomery Electric Light & Power Co. 636
Wild & Co. v. Provident Life & Trust Co. 516
William Chisholm, The..... 562
William E. Reis, The 21
William H. Perry Co. v. Klosters Aktie Bolag..... 321

Digitized by Google

Page
Williams, American Can Co. v... 628
Williams, Manson v..... 475
Williams Co. v. United States.... 73
Williamson v. United States..... 180
Wills v. Scranton Cold Storage & Warehouse Co..... 355
Wilmore Coal Co., Brown v..... 295
Wilson, Clement v. 676
Wingle, Otis Steel Co. v. 62
W. M. Ritter Lumber Co. v. Lestershire Lumber & Box Co..... 529
W. M. Ritter Lumber Co., Lestershire Lumber & Box Co. v..... 527
Worcester County Gas Co. v. Dresser 649
W. T. Carter & Bro. v. Kirby Lumber Co. 14
Wylie, In re..... 411

Youngstrom, In re 232

Zanmati & Co. v. United States.. 626

*

Digitized by Google

Digitized by Google

CASES REPORTED.

ARRANGED UNDER THEIR RESPECTIVE CIRCUITS.

FIRST CIRCUIT.

Page

Armour & Co. v. Skene 385
Augusta Trust Co. v. Federal Trust Co. 309

Beebe v. Wells..... 285
Brock v. Fuller Lumber Co..... 402
Burditt & Williams Co. v. United States 201

Federation Shoe Co., In re..... 285

Gloucester Electric Co. v. Dover 291

Manson v. Williams..... 475

Perry Co. v. Klosters Aktie Bolag 321

Thomson-Houston Electric Co. v. McLean 629
Town of Nahant, Ex parte 470
Tucker, In re 225
Tucker v. Curtin 225

United Shoe Machinery Co. v. Greenman 581
United States, In re..... 470
United States v. Town of Nahant 470

William H. Perry Co. v. Klosters Aktie Bolag..... 321
Worcester County Gas Co. v. Dresser 649

SECOND CIRCUIT.

American Can Co. v. Williams.... 628
American Fine Art Co. v. Simon.. 675
A. Zanmati & Co. v. United States 626

Bonsall v. Platt..... 260

Page

Bradley v. Lehigh Val. R. Co..... 426
Brown v. United States..... 318
Butler v. New York Cent. & H. R. R. Co. 330

Choy Chong Woh & Co. v. United States 608
Clement v. Wilson..... 676

Dudley & Co. v. United States.... 627

Federal Ins. Co. v. Starin..... 657
Ferguson, The..... 442
Folmina, The..... 440

Ginty v. New Haven Iron & Steel Co. 110
Golden Rod, The..... 345

Hall Signal Co. v. General R. Signal Co. 653
Hanover Nat. Bank of City of New York v. Suddath..... 676
Hanover Nat. Bank of City of New York v. Suddath..... 677

Lestershire Lumber & Box Co. v. W. M. Ritter Lumber Co..... 527

National Cash Register Co. v. Grobet 651
National Enameling & Stamping Co. v. New England Enameling Co. 359
New York, N. H. & H. R. Co. v. De Noyelles 497

Perkins-Goodwin Co., Appeal of.. 343

Remington Automobile & Motor Co., In re 421

Digitized by Google

Page

Ritter Lumber Co. v. Lestershire Lumber & Box Co. 529

Scows 8, 20, and 7, The 678
Spencer & Co. v. United States ... 656
Stamford, The 677

Tenedos, The 671

U. H. Dudley & Co. v. United States 627
United Educational Co., In re 343
United States v. Colby & Co. 629

Violetta, The 678

Weinreb, In re 439
Westinghouse Electric Mfg. Co. v. Montgomery Electric Light & Power Co. 636
W. M. Ritter Lumber Co. v. Lestershire Lumber & Box Co. 529

Zanmati & Co. v. United States .. 626

THIRD CIRCUIT.

Brown v. Wilmore Coal Co. 295

Continuous Glass Press Co. v. Schmertz Wire Glass Co. 587

Fadley v. Baltimore & O. R. Co. .. 464
Fidelity & Deposit Co. v. Agnew 103

Jayne v. Loder 625
Joseph Wild & Co. v. Provident Life & Trust Co. 516

Markell v. Matteson 518
Minard v. Delaware, L. & W. R. Co. 586

Payne v. Knickerbocker Trust Co. 350

United States v. Peeke 340

Wild & Co. v. Provident Life & Trust Co. 516
Wills v. Scranton Cold Storage & Warehouse Co. 355
Wylie, In re 411

FOURTH CIRCUIT.

Page

Ann J. Trainer, The 332

Bayport, The 332
Board of Com'rs of Hertford County, N. C., v. Tome 215

Calhoun County Bank v. Cain 114

Dauntless, The 327
Dillingham v. Bakley 659

Goodlander-Robertson Lumber Co. v. Atwood 109

Hyams v. Federal Coal & Coke Co. 324

Kean v. Dickinson 667

Oak, The 327
Old Nick Williams Co. v. United States 73
Oxford & Coast Line R. Co. v. Union Bank of Richmond, Va. .. 609

Palatine Ins. Co., Limited, of Manchester, Eng., v. O'Brien 70

Southern R. Co. v. Carr 240
Southern R. Co. v. Power Fuel Co. 65
Sprinkle v. United States 1

Trainer, The Ann J. 332

Weems Steamboat Co. of Baltimore City v. People's Steamboat Co. 276
Williams Co. v. United States 73

FIFTH CIRCUIT.

Bettis v. Frederick Leyland & Co. 525

Carter & Bro. v. Kirby Lumber Co. 14

Ellis, The 112

Frederick Leyland & Co. v. Holmes 511

Galicia, The 112

Johnson v. Frederick Leyland & Co. 526

Leyland & Co. v. Holmes 511

Digitized by Google

Page
McCormick v. Solinsky..... 134
Marthinson v. King..... 360

Portland Chemical & Phosphate Co. v. Blodgett..... 77

Vicksburg Waterworks Co. v. City of Vicksburg 250

W. T. Carter & Bro. v. Kirby Lumber Co. 14

SIXTH CIRCUIT.

Acme Food Co. v. Meier..... 208
Atlanta, K. & N. R. Co. v. Southern R. Co..... 256

Baer v. Sleicher..... 281
Bennett, In re..... 531

Carnegie Steel Co. v. Byers..... 115
Chisholm, The William..... 562
Craft v. Schafer..... 349
Cumberland Coal & Coke Co. v. Gray 87
Cunningham v. City of Cleveland, Tenn. 55

Eads, The James B..... 21

Fanny Neil, The..... 21

James B. Eads, The 21
John D. Park & Sons Co. v. Hartman 158
John W. Moore, The..... 21

Kentucky Coal, Timber, Oil & Land Co. v. Howes..... 337
Kinnear Mfg. Co. v. Carlisle..... 81

Lehigh Valley Transp. Co. v. Chisholm 562

Memphis Consol. Gas & Electric Co. v. Bell..... 25
Miller v. Steele..... 572
Molt v. Illinois Cent. R. Co..... 430
Moore, The John W. 21

Neil, The Fanny..... 21
New Amsterdam Casualty Co. v. Cumberland Telephone & Telegraph Co. 315

Page
Oceanica, The..... 562
Ohio Valley Bank Co. v. Switzer 438
Otis Steel Co. v. Wingle 62

Park & Sons Co. v. Hartman.... 158

Reed v. Moore & McFerrin..... 434
Reis, The William E..... 21
Rice v. Norfolk & W. R. Co. 447

United States v. Larkin..... 247

William Chisholm, The..... 562
William E. Reis, The 21

SEVENTH CIRCUIT.

Dr. Peter H. Fahrney & Sons Co. v. Ruminer..... 621

Fahrney & Sons Co. v. Ruminer.. 621

Murray v. Orr & Lockett Hardware Co. 445

Peter H. Fahrney & Sons Co. v. Ruminer 621

Southern R. Co. v. St. Louis Hay & Grain Co..... 614

EIGHTH CIRCUIT.

Armour Packing Co. v. United States 135
Arts, In re..... 91
Arts v. Coder..... 91
Atchison, T. & S. F. R. Co. v. Hurley 453

Burns v. Cooper 300

Chicago & N. W. R. Co. v. O'Brien 461
Chitwood v. United States..... 505
Coder, In re..... 91
Coder, In re..... 99
Coder v. Arts..... 91
Coder v. McPherson..... 99
Cole v. Carson..... 408
Cudahy Packing Co. v. United States 135

Digitized by Google

Page

Deere & Webber Co. v. Dowagiac Mfg. Co. 351

Files v. Rankin..... 491
Freeman v. Freeman..... 413

Jarmuth v. Dayton..... 588

Manson v. Dayton..... 588
Morris & Co. v. United States... 135

Old Colony Zinc & Smelting Co. v. Carrick..... 347

St. Louis Southwestern R. Co. v. Wainwright 16
St. Louis & S. F. R. Co. v. Dewees 190
Sass & Crawford v. Thomas.... 19
School Dist. No. 11, Dakota County, Neb., v. Chapman..... 35
Sheridan v. Allen..... 522
Standard Oil Co. v. Parkinson... 29
Stanley v. Beckham..... 304
Stearns v. United States..... 48

Page

Swift & Co. v. United States..... 135

Towle v. First Nat. Bank..... 520

Western Real Estate Trustees v. Hughes 514

Youngstrom, In re 232

NINTH CIRCUIT.

Biggs v. United States..... 180

Evenson v. Spaulding..... 263

Ferguson v. Blood..... 482

Hubbard v. Cook..... 508

Southern Pac. Co. v. Burch..... 34

Van Gesner v. United States..... 180

Williamson v. United States..... 180

Digitized by Google

CASES CITED.

Page

Abby, The, 1 Mason, 360, Fed. Cas. No. 14 250
Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801 410
Addyston Pipe Co. Case, 85 Fed. 271, 282, 29 C. C. A. 141, 46 L. R. A. 122..... 177
Addyston Pipe Co. v. U. S., 175 U. S. 211, 244, 20 Sup. Ct. 96, 44 L. Ed. 136...179, 180
Alaska Min. Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390..... 84
Allen, In re (D. C.) 96 Fed. 512..... 534
Allen v. Smith, 173 U. S. 389, 399, 19 Sup. Ct. 446, 43 L. Ed. 741..... 203
Allgair v. William F. Fisher & Co., 143 Fed. 962, 75 C. C. A. 148..... 411
Almy v. California, 24 How. 169, 16 L. Ed. 644..... 147
American Bridge Co. v. Seeds, 144 Fed. 605, 75 C. C. A. 407.....85, 437
American File Co. v. Garrett, 110 U. S. 288, 295, 4 Sup. Ct. 90, 28 L. Ed. 149.... 460
American Fine Art Co. v. Simon, 140 Fed. 529, 72 C. C. A. 45..... 675
American Strawboard Co. v. Paper Co., 83 Fed. 619, 27 C. C. A. 634..... 175
American Woolen Co., Appeal of, 57 C. C. A. 412, 121 Fed. 658..... 518
Ammunition Co. v. Nordenfeldt, L. R. 1 Ch. Div. 630, 1894..... 164
Anderson v. Santa Anna, 116 U. S. 356, 365, 6 Sup. Ct. 413, 29 L. Ed. 633..... 221
Andrews v. Ass'n, 67 S. W. 326, 23 Ky. Law Rep. 2418..... 537
Appollinaris Co. v. Scherer (C. C.) 27 Fed. 18, 21..... 173
Arkansas Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854..... 402
Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440..... 436
Armstrong v. State, 41 Tenn. 339..... 141
Arnold v. U. S., 147 U. S. 494, 497, 13 Sup. Ct. 406, 37 L. Ed. 253..... 204
Ashton v. Coryton, L. R. 13 Eq. 76..... 312
Aspen Min. Co. v. Billings, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986..... 337
Atchison, T. & S. F. R. Co. v. Phipps, 60 C. C. A. 314, 316, 125 Fed. 478, 480... 307
Athabasca, The (D. C.) 45 Fed. 651..... 571
Atlanta, K. & N. R. Co. v. Railroad Co., 131 Fed. 657, 666, 66 C. C. A. 601, 664... 256, 257
Atwood v. Railroad Co. (C. C.) 72 Fed. 447, 454, 455..... 30
Augusta Trust Co. v. Trust Co. (C. C.) 140 Fed. 930..... 309
Aurora City v. West, 7 Wall. 82, 104, 19 L. Ed. 42..... 405
Austin v. O'Reilly, Fed. Cas. No. 665.... 542

Page

Bagley v. Mill Co., 22 Blatchf. 342, 21 Fed. 159 528
Baier v. Berberich, 85 Mo. 50..... 409
Baker, In re (C. C.) 23 Fed. 30.....662, 665
Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80 669
Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772... 84
Baltimore & O. R. Co. v. Brown, 146 Fed. 24, 76 C. C. A. 482..... 84
Baltimore & O. R. Co. v. Weedon, 78 Fed. 584, 24 C. C. A. 249..... 339
Bank v. Almy, 117 Mass. 476..... 480
Bank v. Cooper, 20 Wall. 171, 177, 22 L. Ed. 273..... 233
Bank v. Moss, 6 How. 31, 12 L. Ed. 331.. 580
Bank v. Sherman, 101 U. S. 403, 406, 25 L. Ed. 866..... 238
Barker v. Harvey, 181 U. S. 481, 490, 21 Sup. Ct. 690, 45 L. Ed. 963..... 51
Barnard v. Randle, 49 C. C. A. 177, 110 Fed. 906 43
Barnes v. Williams, 11 Wheat. (U. S.) 416, 6 L. Ed. 508..... 521
Barnett v. Knight, 7 Colo. 365, 3 Pac. 747 237
Barnewell v. Stephens, 38 So. 662, 142 Ala. 609..... 20
Barnum v. Okolona, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495..... 221
Barrington v. Dock Co. (Wash.) 45 Pac. 748, 33 L. R. A. 116..... 281
Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729..... 323
Barton v. Dunlap, 66 Pac. 832, 8 Idaho, 82 487
Bast v. Bank, 101 U. S. 96, 25 L. Ed. 794 593
Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517..... 459
Beaver Coal Co., In re (D. C.) 107 Fed. 98 534
Bedford Belt R. Co. v. Brown, 142 Ind. 659, 666, 42 N. E. 359, 361..... 437
Beebe v. Russell, 19 How. (U. S.) 283, 15 L. Ed. 658..... 255
Belding, In re (D. C.) 116 Fed. 1016..... 96
Belknap, In re (D. C.) 96 Fed. 614, 616.. 141
Bement v. Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058..... 161, 162, 168, 170
Berlin & Jones Envelope Co. Case, 166 N. Y. 292, 59 N. E. 906..... 171
Berry v. Railroad Co., 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371..... 451
Bierbower v. Polk, 17 Neb. 268, 278, 22 N. W. 698..... 43
Black v. Maddox, 104 Ga. 157, 30 S. E. 723 363

Digitized by Google

Page

Blackburn v. Mining Co., 175 U. S. 571, 574, 20 Sup. Ct. 222, 44 L. Ed. 276..... 323
Blake, In re, 80 C. C. A. 167, 150 Fed. 279 238
Bleakley v. White, 4 Paige (N. Y.) 654.. 429
Blease v. Garlington, 92 U. S. 1, 6, 23 L. Ed. 521..... 326
Blunt v. Little, 3 Mason, 102. Fed. Cas. No. 1578..... 402
Board v. Trust Co. (N. C.) 55 S. E. 442.. 218, 219, 235
Board of Com'rs v. Geer, 47 C. C. A. 450, 108 Fed. 478..... 303
Board of Com'rs v. Tollman, 145 Fed. 753, 76 C. C. A. 317.....216, 222
Board of Trade v. Christie, 198 U. S. 236, 250, 252, 25 Sup. Ct. 637, 49 L. Ed. 1031 .....164, 165, 168
Board of Trade of City of Chicago v. Commission Co., 76 C. C. A. 28, 145 Fed. 28 267
Bobbs-Merrill Co. v. Straus (C. C. A.) 147 Fed. 15, 23, 77 C. C. A. 607.....163, 165
Bonner, In re, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149.....342, 343
Boston R. R. Co. v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006.. 4
Bowne, In re, Fed. Cas. No. 1,741....536, 542
Boyce's Ex'rs v. Grundy, 9 Pet. 275, 9 L. Ed. 127 577
Brady v. Railroad Co., 114 Fed. 100, 107, 52 C. C. A. 48, 55, 57 L. R. A. 712..... 30
Bratsberg, The, 127 Fed. 1005..... 564
Brewster v. Van Liew, 119 Ill. 554, 8 N. E. 842 669
Brick v. Railroad Co., 98 N. Y. 211..... 436
Brimmer v. Boston, 102 Mass. 19..... 474
Broderick v. Railroad Co., 74 Minn. 163, 77 N. W. 28..... 436
Brooks v. Morris, 11 How. 203, 204, 207, 13 L. Ed. 665.....75, 338
Brooks v. Sacks, 81 Fed. 403, 26 C. C. A. 456 586
Brown, In re, Fed. Cas. No. 1,974..... 560
Brown v. Lanyon, 78 C. C. A. 528, 148 Fed. 838 354
Brown v. McConnell, 124 U. S. 489, 490, 8 Sup. Ct. 559, 31 L. Ed. 495..... 77
Brown v. Piper, 91 U. S. 37, 43-44, 23 L. Ed. 200..... 358
Brown v. Sutton, 129 U. S. 238, 9 Sup. Ct. 273, 32 L. Ed. 664..... 487
Brownsville v. Loague, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. Ed. 780.....218, 219
Brunquest, In re, Fed. Cas. No. 2,055... 543
Brush v. Condit, 132 U. S. 39, 47, 48, 10 Sup. Ct. 1, 33 L. Ed. 251..... 586
Buckner v. Warren, 41 Ark. 532..... 20
Buckstaff v. Russell, 151 U. S. 626, 637, 14 Sup. Ct. 448, 452, 38 L. Ed. 292..... 307
Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618..... 55
Bulgaria, The, 83 Fed. 312, 314..... 564
Bulwer's Case, 7 Co. 2b. 3b..... 139
Burfenning v. Railroad Co., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175..... 51
Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.....220, 224
Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596.....537, 559

Page

Burns v. Cooper, 72 C. C. A. 25, 140 Fed. 273 300
Burton v. U. S., 73 C. C. A. 243, 142 Fed. 57 .....43, 53
Butchers' & Drovers' Stockyards Co. v. Railroad Co., 67 Fed. 35, 14 C. C. A. 290 266
Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451..... 577
Byler v. Jones, 79 Mo. 261..... 410
Byrne, In re (D. C.) 97 Fed. 762.....533
Byrne v. Railroad Co., 9 C. C. A. 666, 61 Fed. 605, 608, 24 L. R. A. 693.....30, 64
Bywell Castle, 4 Prob. Div. 224..... 568

Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415..... 187
Caldy, The (D. C.) 123 Fed. 802, 805..... 335
Calvert v. Dock Co., 2 Keen. 639..... 104
Camfield v. U. S., 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260..... 55
Campbell, In re (D. C.) 102 Fed. 686..... 560
Campbell v. Railroad Co., 23 Ohio St. 168, 188.....448, 449
Capron v. Thompson, 86 N. Y. 418..... 669
Carlson v. Railroad Co., 21 Or. 450, 28 Pac. 497 436
Carnegie Steel Co. v. Byers, 82 C. C. A. 115, 149 Fed. 667..... 432
Carr v. Hamilton, 129 U. S. 252, 9 Sup. Ct. 295, 32 L. Ed. 669..... 458
Carroll v. Carroll's Lessee, 16 How. 275, 287, 14 L. Ed. 936.....221
Carroll Co. v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517.....220, 221, 224
Carver, In re (C. C.) 103 Fed. 624, 626... 662, 663, 665
Carver v. U. S., 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602..... 306
Cathcart v. Robinson, 5 Pet. 264, 8 L. Ed. 120 366
Catherine, The, 2 Hagg. Adm. 145..... 571
Cayuga, The, 59 Fed. 483, 488, 8 C. C. A. 188.....565, 571
Celluloid Mfg. Co. v. Mfg. Co. (C. C.) 34 Fed. 324 355
Central Shade Co. v. Cushman, 143 Mass. 353, 9 N. E. 629..... 169
Central Transp. Co. v. Car Co., 139 U. S. 24, 53, 11 Sup. Ct. 478, 35 L. Ed. 55.. 164, 467
Central Trust Co. v. Railroad Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458 .....535, 537
Central Trust Co. v. Trust Co., 30 C. C. A. 235, 86 Fed. 517..... 460
Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442.....163, 164, 167
Chambers v. Tinplate Co., 129 Fed. 561, 64 C. C. A. 129..... 86
Chambers, Calder & Co., In re (D. C.) 98 Fed. 865..... 460
Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800..... 259
Chase, In re, 59 C. C. A. 629, 124 Fed. 753 458
Chateaugay Ore & Iron Co., In re, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508... 71

Digitized by Google

Page

Chesapeake & O. R. Co. v. Hennessey, 96 Fed. 713, 38 C. C. A. 307..... 436
Chicago, B. & Q. R. Co. v. Bond, 58 Neb. 385, 78 N. W. 710..... 33
Chicago, B. & Q. R. Co. v. Van Buskirk, 58 Neb. 252, 78 N. W. 514..... 33
Chicago Co. v. Clark, 92 Fed. 963, 35 C. C. A. 120..... 530
Chicago City R. Co. v. Bundy, 210 Ill. 39, 44, 71 N. E. 28..... 306
Chicago, etc., Co. v. Flynn, 154 Ill. 448, 453, 40 N. E. 332..... 195
Chicago G. W. R. Co. v. Roddy, 65 C. C. A. 470, 131 Fed. 712..... 194
Chicago, R. I. & P. R. Co. v. Hambel, 89 N. W. 643, 644, 2 Neb. (Unof.) 607... 33
Chicago, R. I. & P. R. Co. v. Holmes, 94 N. W. 1007, 68 Neb. 826..... 33
Chicago, R. I. & P. R. Co. v. Young, 58 Neb. 678, 79 N. W. 556..... 33
Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 215, 8 N. E. 460, 59 Am. Rep. 341.. 474
Chicago & N. W. R. Co. v. Bayfield, 37 Mich. 205, 214, 215..... 32
Choy Chong Woh & Co. v. U. S., 153 Fed. 879, 82 C. C. A. 608..... 626
Cincinnati, etc., R. Co. v. Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533.....117, 432
Cincinnati, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 197, 16 Sup. Ct. 700, 40 L. Ed. 935..... 152
City Nat. Bank v. Bruce, 109 Fed. 69, 48 C. C. A. 236..... 96
City of Birmingham, The, 71 C. C. A. 115, 138 Fed. 555, 559..... 335
City of Cleveland v. U. S., 111 Fed. 341, 49 C. C. A. 383; 127 Fed. 667, 62 C. C. A. 393.....56, 57
City of Friend v. Burleigh, 53 Neb. 674, 676, 74 N. W. 50..... 33
City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560..... 58
City of Manning v. Insurance Co., 46 C. C. A. 144, 107 Fed. 52..... 18
City of Waxahachie v. Coler, 92 Fed. 284, 34 C. C. A. 349..... 76
City of Wilmington v. Ricaud, 90 Fed. 212, 32 C. C. A. 578..... 76
City Trust Co., In re, 121 Fed. 706, 58 C. C. A. 126..... 536
Clark v. Evans, 13 C. C. A. 433, 66 Fed. 263 46
Clark v. Fredericks, 105 U. S. 4, 5, 26 L. Ed. 938.....396, 399
Clark v. Trindle, 52 Pa. 492-496..... 298
Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392..... 354
Cleland v. Anderson, 66 Neb. 252, 262, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075 39
Clement v. Field, 147 U. S. 467, 13 Sup. Ct. 358, 37 L. Ed. 244..... 284
Cleveland, C. & C. R. Co. v. Keasy, 3 Ohio St. 201..... 84
Cleveland, etc., Co. v. Wade, 18 Ind. App. 346, 48 N. E. 12..... 18
Coburn v. Land Co., 138 U. S. 196, 222, 11 Sup. Ct. 258, 34 L. Ed. 876..... 259
Coburn v. Murray, 2 Me. 336..... 612

Page

Coffin v. U. S., 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; 162 U. S. 664, 672, 16 Sup. Ct. 943, 40 L. Ed. 1109.....8, 507
Cohen v. Railroad Co., 9 C. C. A. 223, 60 Fed. 698 18
Cohn v. Lehman, 93 Mo. 574, 6 S. W. 267 410
Columbia R. Co. v. Hawthorne, 144 U. S. 202, 207, 208, 12 Sup. Ct. 591, 36 L. Ed. 405 .....393, 394
Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405 86
Columbus, etc., R. R. Appeals, 109 Fed. 177, 48 C. C. A. 275.....537, 559
Comet, The, 9 Blatchf. 323, Fed. Cas. No. 3,051..... 571
Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214..... 139
Com. v. Macloon, 101 Mass. 1, 5, 6, 100 Am. Dec. 89..... 139
Com. v. Parker, 165 Mass. 526, 43 N. E. 499 139
Com. v. Uprichard, 3 Gray (Mass.) 434, 436, 63 Am. Dec. 762..... 139
Compton v. Railroad Co., 45 Ohio St. 592, 613, 614, 16 N. E. 110, 18 N. E. 380 450
Conard v. Insurance Co., 1 Pet. 386, 7 L. Ed. 189.....323, 547
Continental Wall Paper Co. v. Voight & Sons Co., 148 Fed. 939, 78 C. C. A. 567.. 175
Contracting & Building Co. v. Trust Co., 108 Fed. 1, 47 C. C. A. 143..... 594
Cooper v. Burns, 133 Fed. (C. C.) 398... 301
Cornelius v. Kessel, 128 U. S. 461, 9 Sup. Ct. 122, 32 L. Ed. 482..... 187
Cornell v. Coyne, 192 U. S. 418, 427, 24 Sup. Ct. 383, 48 L. Ed. 504..... 148
Cosmos Exploration Co. v. Oil Co. (C. C.) 104 Fed. 20-43; 112 Fed. 4-11, 50 C. C. A. 79, 61 L. R. A. 230..... 187
Coughran v. Bigelow, 164 U. S. 301, 17 Sup. Ct. 117, 41 L. Ed. 442..... 468
County of Cass v. Gillett, 100 U. S. 585, 593, 25 L. Ed. 585..... 48
County of Warren v. Marcy, 97 U. S. 96, 109, 24 L. Ed. 977..... 48
C. P. Harmon, In re (D. C.) 128 Fed. 170 560
Craig v. State, 3 Heisk. (Tenn.) 227..... 141
Cramond, In re (D. C.) 145 Fed. 976..... 458
Credit Co. v. Railroad Co., 128 U. S. 258-261, 9 Sup. Ct. 107, 32 L. Ed. 448.....76, 338
Cromwell v. Sac Co., 96 U. S. 51, 58, 24 L. Ed. 681..... 46
Crow, In re (D. C.) 116 Fed. 110, 112..... 532, 544, 547
Cunningham v. Cleveland, 98 Fed. 657, 39 C. C. A. 211..... 56
Curtis, In re, 1 Am. Bankr. Rep. 440, 91 Fed. 737..... 546
Curtis v. Railroad Co., 27 Wis. 158, 168... 18

Daigneau v. Railroad Co., 153 Fed. 593.. 402
Daniels, In re (D. C.) 110 Fed. 745..... 533, 534, 546
Dartmouth Spinning Co. v. Achord, 84 Ga. 16, 10 S. E. 449, 6 L. R. A. 190.... 437
Davidson v. Friedman, 140 Fed. 853, 72 C. C. A. 553..... 438

Digitized by Google

Page

Davis v. Bilsland, 18 Wall. 659, 21 L. Ed. 969 560
Davis v. Railroad Co., 114 Pa. 308, 314, 6 Atl. 736..... 474
Davis v. U. S., 43 C. C. A. 448, 451, 453, 104 Fed. 136, 139, 142.....140, 141, 150
Davison, In re (C. C.) 21 Fed. 618..... 665
Dealy v. U. S., 152 U. S. 539, 544, 545, 547, 14 Sup. Ct. 680, 38 L. Ed. 545.....52, 141
Debnam v. Chitty, 131 N. C. 657, 43 S. E. 3 .....217, 218, 220, 222, 225
Deeds v. Stephens, 69 Pac. 534, 8 Idaho, 514 487
Deere v. Com'rs (C. C.) 33 Fed. 823...58, 59
Deering v. Harvester Works, 155 U. S. 286, 300, 301, 15 Sup. Ct. 118, 39 L. Ed. 153 586
Deery v. Cray, 5 Wall. 795, 807, 18 L. Ed. 653 4
Delmar, The (D. C.) 125 Fed. 130..... 334
De Mattos v. Gibson, 4 De J. & Jones, 276 .....173, 174
Dempsey v. State, 22 S. E. 57, 94 Ga. 766 141
Deputron v. Young, 134 U. S. 241, 250, 10 Sup. Ct. 539, 33 L. Ed. 923..... 323
Devore, In re, Fed. Cas. No. 3,847..... 98
Dey, In re, 9 Blatchf. 285, Fed. Cas. No. 3,871 536
D. H. Miller, The, 76 Fed. 877, 22 C. C. A. 597, 33 U. S. App. 717..... 571
Dickerson v. Tinling, 84 Fed. 192, 28 C. C. A. 139..... 161
Dickson v. Wyman, 49 C. C. A. 574, 111 Fed. 726 517
Dimmick v. Tompkins, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110..... 342
Dinsmore v. Stimbert, 12 Neb. 433, 11 N. W. 872 44
Dishon v. Railroad Co., 133 Fed. 471, 474, 66 C. C. A. 345..... 260
District of Columbia v. McElligott, 117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946.. 245
District of Columbia v. Moulton, 132 U. S. 579, 21 Sup. Ct. 840, 45 L. Ed. 1237.. 65
Dixon-Woods Co. v. Pfeifer, 55 Fed. 390, 395, 5 C. C. A. 153..... 647
Dr. Miles Medical Co. v. Goldthwaite (C. C.) 133 Fed. 794..... 168
Dr. Miles Medical Co. v. Jaynes (C. C.) 149 Fed. 838..... 168
Dr. Miles Medical Co. v. Platt (C. C.) 142 Fed. 606, 610.....168, 169
Donovan v. Construction Syndicate (1893) 1 Q. B. Div. 629..... 30
Doty v. Burdick, 83 Ill. 473..... 20
Dougan v. State, 30 Ark. 41..... 141
Douglass v. Anderson, 32 Kan. 353, 4 Pac. 283 20
Douglass v. Bunn, 110 Ga. 159-162, 35 S. E. 339 364
Dow v. U. S., 27 C. C. A. 140, 82 Fed. 904, 909 507
Dowling v. Bitjemann, 2 John. & H. 544, s. c. Jur. (N. S.) 538..... 364
Drake v. Root, 2 Colo. 685..... 237
Drexel v. Berney, 122 U. S. 241, 7 Sup. Ct. 1200, 30 L. Ed. 1219..... 577
D. S. Stetson, The, 4 Ben. 508, Fed. Cas. No. 4,104..... 567

Page

Duble, In re (D. C.) 117 Fed. 794, 795.... 536, 542
Dunbar v. U. S., 156 U. S. 185, 192, 15 Sup. Ct. 325, 39 L. Ed. 390..... 53
Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746..... 175
Dunlop v. U. S., 165 U. S. 486, 498, 17 Sup. Ct. 375, 41 L. Ed. 799..... 398
Duplan Silk Co. v. Spencer, 53 C. C. A. 321, 115 Fed. 689..... 458
Dushane v. Beall, 161 U. S. 515, 16 Sup. Ct. 637, 40 L. Ed. 791..... 460
Dutton v. Strong, 66 U. S. 23, 32, 33, 17 L. Ed. 29.....278, 279
Dwelling House Ins. Co. v. Brewster, 43 Neb. 528, 61 N. W. 746..... 44

Eames, Ex parte, Fed. Cas. No. 4,237... 546
Edgens v. Mfg. Co., 69 S. C. 529, 48 S. E. 538 246
Edison Phonograph Co. v. Kaufmann (C. C.) 105 Fed. 960.....161, 162
Edison Phonograph Co. v. Pike (C. C.) 116 Fed. 863.....161, 162
Edwards v. Kearzey, 96 U. S. 595, 601, 24 L. Ed. 793..... 154
Edwin I. Morrison, The, 153 U. S. 199, 215, 217, 14 Sup. Ct. 823, 38 L. Ed. 688 673, 674
Ed. W. Wright Lumber Co., In re (D. C.) 114 Fed. 1011, 1013..... 97
Egbert v. Baltimore, etc., Co., 2 Benedict, 224, Fed. Cas. No. 4,305..... 564
Elk Fork Co. v. Jennings (C. C.) 84 Fed. 839 299
Elliman v. Carrington, L. R. 1901, 2 Ch. Div. 275.....171, 177
Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200..... 214
Empire State Type Co. v. Grant, 114 N. Y. 40, 21 N. E. 49..... 530
Emslie, In re (D. C.) 97 Fed. 929; 102 Fed. 294, 42 C. C. A. 350.....540, 549, 550
Erie R. Co. v. Dial, 72 C. C. A. 183, 140 Fed. 689..... 458
Erie R. Co. v. Kane, 55 C. C. A. 129, 143, 118 Fed. 223, 237..... 195
Erie R. Co. v. Moore, 108 Fed. 986, 46 C. C. A. 683..... 65
Ertz v. Exchange Co. (Minn.) 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. Rep. 433 268
Evans v. Gee, 11 Pet. 80, 9 L. Ed. 639... 322
Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830..... 151
Everhart v. College, 120 U. S. 223, 7 Sup. Ct. 555, 30 L. Ed. 623..... 323
Every Evening Printing Co. v. Butler, 144 Fed. 916, 75 C. C. A. 657..... 410
Exchange Bank v. Moss, 79 C. C. A. 278, 149 Fed. 340..... 507
Exchange Tel. Co. v. Gregory, etc., Co., 1 Q. B. Div. 147..... 165

Fairbank v. U. S., 181 U. S. 283, 294, 295, 21 Sup. Ct. 648, 45 L. Ed. 862..... 147
Falls City Shirt Mfg. Co., In re (D. C.) 98 Fed. 592.....533, 540, 548
Farlow v. Ellis, 81 Mass. 231..... 429
Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931..... 494

Digitized by Google

Page

Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246..... 76
Fay v. Noble, 7 Cush. (Mass.) 188..... 480
Fenno v. Primrose, 119 Fed. 801, 56 C. C. A. 313..... 406
Ferd. Heim Brewing Co. v. Belinder (Mo. App.) 71 S. W. 691..... 268
Field v. Clark, 143 U. S. 649, 671, 12 Sup. Ct. 495, 36 L. Ed. 294..... 40
Files v. Brown, 124 Fed. 133, 59 C. C. A. 403 .....491, 495
First Nat. Bank v. Grosshans, 61 Neb. 575, 579, 85 N. W. 542..... 44
Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292..... 313
Fitchett v. Blows, 20 C. C. A. 286, 290, 74 Fed. 47, 51..... 94
Fitzpatrick v. McAndrews, 12 Pa. Co. Ct. Rep. 353..... 104
Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966..... 577
Flaxseed Case, 157 U. S. 183, 15 Sup. Ct. 583, 39 L. Ed. 665..... 656
Fleming v. Backer (Idaho) 85 Pac. 1092.. 487
Folsom v. Township Ninety-Six, 159 U. S. 611, 627, 16 Sup. Ct. 174, 40 L. Ed. 278 .....220, 221
Forgay v. Conrad, 6 How. (U. S.) 202, 12 L. Ed. 404..... 255
Fosdick v. Schall, 99 U. S. 253, 25 L. Ed. 339 559
Four Packages v. U. S., 97 U. S. 404, 24 L. Ed. 1031..... 250
Fourth St. Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855..... 457
Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67.....164, 166, 168
Fox v. Haarstick, 156 U. S. 674, 15 Sup. Ct. 457, 39 L. Ed. 576..... 521
Frailey v. Winchester, 96 Ky. 570, 29 S. W. 446.....537, 560, 561
Francis v. Green, 65 Pac. 362, 7 Idaho, 668 487
Francis v. Kansas City, etc., Co., 110 Mo. 387, 395, 19 S. W. 935..... 195
Franklin v. Colley, 10 Kan. 260..... 415
Frazee v. Moffitt (C. C.) 18 Fed. 584..... 627
French v. Shoemaker, 12 Wall. (U. S.) 86, 20 L. Ed. 270..... 255
Friend, In re, 67 C. C. A. 500, 502, 134 Fed. 778, 780; 197 U. S. 620, 25 Sup. Ct. 797, 49 L. Ed. 909..... 233
Frye, In re, L. J. 18 L. R. Q. B. Div. 702 437
Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649.....94, 565
Fusselman v. Worthington, 14 Ill. 135... 20
F. W. Dodge, etc., Co. v. Construction Co., 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412..... 165

Gamble v. School Dist., 76 C. C. A. 539, 146 Fed. 113..... 45
Gans v. Ellison, 52 C. C. A. 366, 114 Fed. 734 518
Gantt v. U. S., 47 C. C. A. 210, 108 Fed. 61 52
Garst v. Hall & Lyon Co., 179 Mass. 588, 590, 691, 61 N. E. 219, 55 L. R. A. 631... 172, 173

Page

Garst v. Harris, 177 Mass. 72, 74, 58 N. E. 174.....168, 171, 177
Gaylord, In re, 113 Fed. 131, 7 Am. Bankr. Rep. 577..... 669
Gee v. Thraikill, 45 Kan. 173, 25 Pac. 588 414
Gentilli v. Starace, 133 N. Y. 140, 30 N. E. 660..... 528
George Frost Co. v. Kora Co. (C. C.) 136 Fed. 467; 140 Fed. 987, 71 C. C. A. 19.. 653
Gerow v. Costello, 11 Colo. 561, 19 Pac. 505, 7 Am. St. Rep. 260..... 595
Gillett v. Whiting, 120 N. Y. 402, 24 N. E. 790..... 669
Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62..... 4
Glass v. Hulbert, 102 Mass. 24, 36, 3 Am. Rep. 418..... 459
Goldberg Bros., In re (D. C.) 144 Fed. 566 .....533, 534
Good, In re, 39 C. C. A. 581, 99 Fed. 389 233
Good v. Daland, 121 N. Y. 1, 24 N. E. 15 169
Goode v. U. S., 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297..... 342
Goodlett v. Railroad Co., 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230..... 245
Goodwin v. Investment Co., 110 U. S. 1, 5, 3 Sup. Ct. 473, 28 L. Ed. 47..... 237
Graham v. Bayne, 18 How. 60, 63, 15 L. Ed. 265..... 522
Graham v. Holt, 4 B. Mon. (Ky.) 61..... 537, 561
Graham v. McCampbell, 19 Tenn. 52, 33 Am. Dec. 126..... 487
Graham v. Railroad Co. (La.) 16 South. 806, 27 L. R. A. 416, 49 Am. St. Rep. 366 268
Granite City Bank, In re, 70 C. C. A. 316, 137 Fed. 818..... 238
Grant, In re (D. C.) 143 Fed. 661..... 407
G. R. Booth, The, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234..... 442
Great Southern Hotel Co. v. Jones, 193 U. S. 532, 544, 545, 546, 24 Sup. Ct. 576, 579, 48 L. Ed. 778..219, 220, 221, 222, 223, 224
Green v. Brainerd, etc., Co., 85 Minn. 318, 88 N. W. 974..... 195
Griffee v. Railroad Co., 2 I. C. C. R. 301 142
Grimley, Ex parte, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636..... 662
Grissler, In re, 136 Fed. 754, 69 C. C. A. 406 543
Groetzinger & Sons, In re, 62 C. C. A. 124, 127 Fed. 124..... 233
Grommes v. Trust Co., 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248..... 600
Gruman v. Smith, 81 N. Y. 25..... 669
Guarantee Co. of North America v. Insurance Co., 59 C. C. A. 376, 124 Fed. 170 303
Gubbins v. Laughtenschlager (C. C.) 75 Fed. 615..... 323
Gulf, etc., R. Co. v. Hefley, 158 U. S. 98, 105, 15 Sup. Ct. 802, 39 L. Ed. 910..... 152
Gulf, etc., R. Co. v. Jackson, 65 Fed. 48, 12 C. C. A. 507..... 436
Gutwillig, In re, 92 Fed. 337, 34 C. C. A. 377 97

Hadji, The, 22 Blatchf. 235, 20 Fed. 875.. 430

Digitized by Google

Page

Haley v. Kilpatrick, 44 C. C. A. 102, 104 Fed. 647 303
Hamilton v. Elliott, 5 Serg. & R. 375 298
Hamilton v. Pandorf, 16 Q. B. D. 633, 12 App. Cas. 523 442
Haney v. Packet Co., 23 How. 287, 16 L. Ed. 562 334
Hansbrough v. Peck, 5 Wall. 497, 505, 18 L. Ed. 520 598
Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746 402
Hardin v. Boyd, 113 U. S. 764, 5 Sup. Ct. 771, 28 L. Ed. 1141 487
Harkison v. Harkison, 41 C. C. A. 201, 101 Fed. 71 515
Harris v. Bridge Co., 90 Fed. 322, 33 C. C. A. 69 538
Harrison v. Glucose Co., 116 Fed. 304, 311, 53 C. C. A. 484, 58 L. R. A. 915 164
Hartman v. Park (C. C.) 145 Fed. 358... 168, 177
Hartranft v. Wiegmann, 121 U. S. 609, 615, 616, 7 Sup. Ct. 1240, 30 L. Ed. 1012.. 203
Harvey v. State, 5 Ind. App. 422, 31 N. E. 835 612
Hatch v. Railroad Co., 212 Pa. 29, 61 Atl. 480 18
Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075 458
Hauss v. Railroad Co., 105 Fed. 733, 46 C. C. A. 94 436
Hawley v. Diller, 178 U. S. 495, 20 Sup. Ct. 986, 44 L. Ed. 1157 187
Heaton-Peninsular Button Co. v. Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728 ..... 161, 168
Hemmaker v. State, 12 Mo. 453, 51 Am. Dec. 172 139
Henderson v. Mayor, 92 U. S. 259, 23 L. Ed. 543 665
Hermann v. Hodges, L. R. 16 Eq. 18..... 312
Hervey v. Locomotive Works, 93 U. S. 664, 672, 23 L. Ed. 1003 594
Hewit v. Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986 ..... 238, 459
Hill v. Bush, 19 Ark. 528 494
Hilsdorf v. St. Louis, 45 Mo. 94, 98, 100 Am. Dec. 352 30
Hinton v. Coleman, 76 Wis. 221, 45 N. W. 26 308
Hipp v. Babin, 19 How. 271, 15 L. Ed. 633 577
Hitchcock v. Anthony, 83 Fed. 779, 28 C. C. A. 80 175
Hobbs v. McLean, 117 U. S. 567, 579, 6 Sup. Ct. 870, 29 L. Ed. 940 578
Hobson v. Lord, 92 U. S. 412, 23 L. Ed. 613 564
Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816 175
Hoggson, etc., Co. v. Sears, 60 Atl. 133, 136, 77 Conn. 587 306
Hogton, In re, L. R. 18 Eq. (1874) 573... 229
Holiday v. Mattheson (C. C.) 24 Fed. 185 653
Holmes, In re, 73 C. C. A. 491, 142 Fed. 391 233
Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 Pac. 435 597
Home Ben. Ass'n v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160..... 306

Page

Home Fire Ins. Co. v. Johansen, 59 Neb. 349, 80 N. W. 1047 44
Homer v. Shaw, 177 Mass. 1, 58 N. E. 160 460
Hooper v. Rathbone, Taney 519, Fed. Cas. No. 6,676 442
Hoover, In re (D. C.) 113 Fed. 136..... 536, 542, 544, 547
Hoover v. State, 59 Ala. 57 157
Hopkins v. Stave Co., 83 Fed. 912, 28 C. C. A. 99 268
Hopt v. Utah, 120 U. S. 430, 438, 7 Sup. Ct. 614, 30 L. Ed. 708 398
Horner v. Graves, 7 Bing. 735 177
Hough v. Railroad Co., 100 U. S. 224, 25 L. Ed. 612 245
Howard v. Howard, 52 Kan. 469, 34 Pac. 1114 415
Howard-Harrison Iron Co., Ex parte, 119 Ala. 484, 491, 24 South. 516, 519, 72 Am. St. Rep. 928 39
Howe v. Kindred, 42 Minn. 433, 44 N. W. 311 557
Hughes Co. v. Livingston, 43 C. C. A. 541, 555, 104 Fed. 306 ..... 43, 45
Hull v. Miller, 4 Neb. 503 38
Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956 459
Hunter v. Railroad Co., 41 S. C. 86, 19 S. E. 197 67
Huntington, In re (D. C.) 68 Fed. 881... 142
Hussey v. Dry Goods Co., 78 C. C. A. 370, 148 Fed. 598, 599 97
Hutchinson v. Le Roy, 51 C. C. A. 159, 113 Fed. 202, 205 459
Hutchinson v. Otis, 53 C. C. A. 419, 115 Fed. 937, 940; 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179 ..... 459, 481
Hutsell v. Banks, 102 Ky. 410, 43 S. W. 469, 39 L. R. A. 403 ..... 537, 560

Illinois v. Railroad Co., 184 U. S. 77, 91, 22 Sup. Ct. 300, 46 L. Ed. 440 304
Illinois Cent. R. Co. v. Coughlin, 132 Fed. 801, 802, 803, 65 C. C. A. 101..... 117, 121, 432, 433
Illinois Cent. R. Co. v. Guess, 74 Miss. 170, 21 South. 50 195
Illinois Cent. R. Co. v. Neer, 26 Ill. App. 356, 359; 31 Ill. App. 126, 136 196
Independent Ins. Co., In re, Fed. Cas. No. 7,017 546
Indiana, The, 1 Abb. Adm. 430, Fed. Cas. No. 7,020 336
Indian River Co. v. Transportation Co. (Fla.) 10 South. 485 281
Inman v. Railroad Co., 129 U. S. 139, 9 Sup. Ct. 249, 32 L. Ed. 612 430
Inman Bros. v. Lumber Co., 146 Fed. 449, 455, 76 C. C. A. 659, 665 394
Innis v. Templeton, 95 Pa. 262, 40 Am. Rep. 643 298
Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501 577
Insurance Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433 400
International Nav. Co. v. Farr & Bailey Co., 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830 675

Digitized by Google

Page

Interstate Commerce Commission v. Railroad Co. (C. C.) 43 Fed. 37; 141 Fed. 1003 152
Iron Chief, The, 63 Fed. 289, 11 C. C. A. 196, 22 U. S. App. 473 567
Irrawaddy, The, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130 673
Irrigation Co. v. Garland, 164 U. S. 1, 15, 17 Sup. Ct. 7, 41 L. Ed. 327 312
Itasca, The (D. C.) 117 Fed. 885 335
Ives, In re, 113 Fed. 911, 913, 51 C. C. A. 541 231

Jackson v. Lawrence, 117 U. S. 679, 6 Sup. Ct. 915, 29 L. Ed. 1024 213
Jackson v. Stanfield (Ind. Sup.) 36 N. E. 345, 23 L. R. A. 588 268
Jaquith v. Alden, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717 ..... 517, 518
Jarvis v. Knapp, 121 Fed. 34, 58 C. C. A. 1 164
Jayne v. Loder, 149 Fed. 21, 78 C. C. A. 653, 7 L. R. A. (N. S.) 984 ..... 168, 169
Jewelers' Mercantile Agency v. Publishing Co., 155 N. Y. 251, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666; 84 Hun, 12, 32 N. Y. Supp. 41 165
J. H. Alison Lumber Co., In re (D. C.) 137 Fed. 643, 649 96
John D. Park & Sons Co. v. Ass'n, 175 N. Y. 42, 67 N. E. 140, 62 L. R. A. 632, 96 Am. St. Rep. 578 170
John H. Starin, The, 122 Fed. 236, 237, 58 C. C. A. 600 335
John L. Harbrouck, The, 93 U. S. 405, 23 L. Ed. 962 567
John O'Dea, In re, 6 Land Dec. Dep. Int. 819 51
Johnston v. Trippe (C. C.) 33 Fed. 530 363
John Taylor, The, 6 Ben. 227, Fed. Cas. No. 7,429 567
Jones, In re (D. C.) 118 Fed. 673 96
Jones v. Liverpool, 14 Q. B. D. 890 64
Jones v. Olson, 17 Colo. App. 144, 67 Pac. 349 237
Jones v. Publishing Co., 171 Mass. 22, 50 N. E. 15 543
Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436 262
Joseph v. Randolph, 71 Ala. 499, 46 Am. Rep. 347 665
Joseph B. Thomas, The (D. C.) 81 Fed. 578; 86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58 513
Joshua Leviness, The, 9 Ben. 339, Fed. Cas. No. 7,549 250
Jourolmon v. Ewing, 80 Fed. 604, 607, 26 C. C. A. 23 580

Kane v. Railroad Co., 128 U. S. 95, 9 Sup. Ct. 16, 32 L. Ed. 339; 142 Fed. 683, 73 C. C. A. 672 ..... 84, 244, 245
Kane Co. v. Kinney, 174 N. Y. 69, 66 N. E. 619 ..... 536, 541, 543
Kansas, etc., Co. v. Dye, 16 C. C. A. 604, 70 Fed. 24 195
Kearney v. Case, 12 Wall. 275, 20 L. Ed. 395 405
Kearney Electric Co. v. Laughlin, 45 Neb. 390, 395, 63 N. W. 941 33
Kearns, In re (D. C.) 64 Fed. 481 350
Keller v. Railroad Co., 183 N. Y. 67, 75 N. E. 965 331
Kelley v. Railroad Co., 35 Minn. 490, 29 N. W. 173 436
Kelsey v. Hobby, 16 Pet. 269, 277, 10 L. Ed. 961 259
Kennedy v. Gibson, 8 Wall. 498, 505, 19 L. Ed. 476 577
Keppel v. Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790 97
Kerby Denis Co., In re (D. C.) 94 Fed. 818, 819; 95 Fed. 116, 36 C. C. A. 677 ..... 543, 549, 550
Kimball v. Rosenham, 52 C. C. A. 33, 114 Fed. 85 518
Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764 94
King v. Barnes, 109 N. Y. 289, 16 N. E. 332 429
King v. Burdette, 4 B. & Ald. 175, 176 139
Kingman v. Mfg. Co. 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192 77
Kinnear Mfg. Co. v. Carlisle, 152 Fed. 933, 82 C. C. A. 81 437
Kinney, In re (D. C.) 102 Fed. 468 350
Kinney v. Ore Co., 49 Am. St. Rep. 530 560
Kirk v. State, 41 Tenn. 345 141
Kitchen v. Railroad Co., 68 S. C. 554, 48 S. E. 4 599
Knight v. Ass'n, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974 187
Knox Co. v. Morton, 15 C. C. A. 671, 673, 68 Fed. 787, 789 146
Kollock, In re, 165 U. S. 533, 17 Sup. Ct. 444, 41 L. Ed. 813 187
Kraut v. U. S. (C. C.) 139 Fed. 94 ..... 608, 626, 627
Kurtz, In re (D. C.) 125 Fed. 992 544

La Bourgoyne, The, 144 Fed. 781, 75 C. C. A. 647 571
Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214 495
Laird, In re, 109 Fed. 550, 551, 554, 48 C. C. A. 538 ..... 533, 536, 547, 549, 550
Lake Erie & W. R. Co. v. Craig, 73 Fed. 642, 19 C. C. A. 631; 25 C. C. A. 585, 80 Fed. 488 195
Lampson v. Arnold, 19 Iowa, 479, 484, 485 95
Lamson Consol. Store Service Co. v. Bowland, 114 Fed. 639, 52 C. [illegible] 600
Lansing Boiler Works v. Ryerson, 63 C. C. A. 253, 128 Fed. 701 ..... 210, 213
Laurel Cotton Mills v. Railroad C[illegible] South. 134, 84 Miss. 339, 66 L. R. A. 453 152
Leavenworth, etc., Co. v. U. S., 92 U. S. 733, 23 L. Ed. 634 51
Leaycraft v. U. S., 130 Fed. 106, 64 C. C. A. 440 627
Ledbetter v. U. S., 170 U. S. 606, 609, 610, 18 Sup. Ct. 774, 42 L. Ed. 1162 151
Lestershire Lumber & Box Co. v. Lumber Co. (C. C. A.) 153 Fed. 573 529
Lewis, In re (D. C.) 99 Fed. 935 546

Digitized by Google

Page

Lewis v. Cocks, 23 Wall. 466, 23 L. Ed. 70 577
Lewis v. Hawkins, 90 U. S. 126, 23 L. Ed. 113 487
Lexington v. Butler, 14 Wall. 282, 20 L. Ed. 809..... 48
Lipfield v. Railroad Co., 41 S. C. 285, 19 S. E. 497..... 67
Lisk, Ex parte (D. C.) 145 Fed. 860..... 661, 662
Lisnacrieve, The (D. C.) 87 Fed. 570..... 64
Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652.....64, 65
Little v. Harrington, 71 Mo. 390..... 410
Littlefield v. Delaware, etc., Co., Fed. Cas. No. 8,400..... 233
Little Miami R. Co. v. Steven, 20 Ohio, 415 84
Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451..... 542
Looney v. Railroad Co., 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564.....121, 433
Louisiana, The, 3 Wall. 164, 18 L. Ed. 35 24
Louisville, etc., Co. v. Mothershed, 110 Ala. 143, 20 South. 67..... 195
Louisville & N. R. Co. v. Stuber, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696 84
Lowdon v. U. S., 149 Fed. 673, 82 C. C. A. 121..... 433
Lucas v. Wade, 43 Fla. 419, 31 South. 231 81
Lynch v. Craney, 95 Mich. 199, 54 N. W. 879 613
Lytle v. Lansing, 147 U. S. 59, 62, 13 Sup. Ct. 254, 37 L. Ed. 78..... 47

McAulay v. Railroad Co., 33 Vt. 311, 78 Am. Dec. 627.....473, 474
McCall, In re, 145 Fed. 898, 76 C. C. A. 430..... 337
McClure v. Oxford Tp., 94 U. S. 429, 24 L. Ed. 129..... 47
McCormick v. Gray, 13 How. (U. S.) 27, 39, 14 L. Ed. 36..... 73
McCoy v. Jordan, 184 Mass. 575, 69 N. E. 358..... 400
McCrea v. Purmont, 16 Wend. (N. Y.) 465, 466, 30 Am. Dec. 103..... 577
McGough v. Ropner (D. C.) 87 Fed. 534 64
McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828..... 623
McLish v. Roff, 141 U. S. 661-667, 12 Sup. Ct. 118, 35 L. Ed. 893..... 182
McNair v. McIntyre, 113 Fed. 113, 114, 51 C. C. A. 89, 90..... 97
Madden v. Lancaster Co., 12 C. C. A. 566, 572, 573, 65 Fed. 188, 194, 195..145, 152
Magdalen College Case, Coke's Reports, vol. 11, 66..... 665
Male v. Leflang, 63 Pac. 108, 7 Idaho, 348 437
Malony v. Adsit, 175 U. S. 287, 20 Sup. Ct. 117, 44 L. Ed. 163..... 613
Mangles v. Dixon, 3 House of Lords Cases, 703..... 460
Manitoba, The (D. C.) 104 Fed. 145..... 675
Manitou, The, 127 Fed. 554, 63 C. C. A. 109 430

Page

Manning v. Insurance Co., 100 U. S. 698, 25 L. Ed. 761..... 68
Margaret, The, v. Bliss, 94 U. S. 494-496, 24 L. Ed. 146..... 330
Markham v. Jaudon, 41 N. Y. 235..... 668
Marsh, In re (D. C.) 116 Fed. 396..... 544
Martin v. Railroad Co., 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051..... 84
Mason v. Wolkowich, 150 Fed. 699..... 229
Matheson v. Grant, 2 How. 263, 11 L. Ed. 261..... 580
Matthews & Willard Mfg. Co. v. Iron Works (C. C.) 71 Fed. 518..... 355
Mayer, In re, 47 C. C. A. 512, 521, 528, 108 Fed. 599, 606, 615..... 236
Meehan v. Valentine, 145 U. S. 611, 618, 12 Sup. Ct. 972, 36 L. Ed. 835..... 481
Meloy v. Railroad Co., 77 Iowa, 743, 42 N. W. 563, 4 L. R. A. 287, 14 Am. St. Rep. 325..... 464
Memphis Consol. Gas & Electric Co. v. Letson, 135 Fed. 969, 68 C. C. A. 458.. 28
Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526..... 623
Mercantile Trust Co. v. Trust Co., 26 C. C. A. 383, 81 Fed. 254..... 460
Mexico, The (D. C.) 78 Fed. 653..... 571
Michigan Headlining & Hoop Co. v. Wheeler, 141 Fed. 61, 72 C. C. A. 71 65
Michigan Ins. Bank v. Eldred, 143 U. S. 293, 298, 12 Sup. Ct. 450, 452, 36 L. Ed. 162.....515, 614
Miller v. Insurance Co., 12 Wall. (U. S.) 285, 301, 20 L. Ed. 398..... 521
Miller v. Railroad Co., 76 Iowa, 655, 659, 39 N. W. 188, 14 Am. St. Rep. 258.... 20
Miller v. U. S., 66 C. C. A. 399, 403, 133 Fed. 337, 341..... 151
Mills' Case, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107..... 342
Minard v. Railroad Co. (C. C.) 139 Fed. 60 586
Minneapolis Harvester Works v. Hally, 27 Minn. 495, 8 N. W. 597..... 596
Minnie, The, 100 Fed. 128, 40 C. C. A. 312 659
Missina v. Cavazos, 6 Wall. 355, 18 L. Ed. 810..... 77
Mitchell, In re (D. C.) 116 Fed. 87..... 536, 542, 544, 547
Mobile & O. R. Co. v. Dismukes, 10 South. 289, 94 Ala. 131, 17 L. R. A. 113 152
Monongahela Nav. Co. v. U. S., 148 U. S. 312, 326, 13 Sup. Ct. 622, 37 L. Ed. 463 474
Montague v. Lowry, 193 U. S. 38, 45, 46, 24 Sup. Ct. 307, 48 L. Ed. 608..... 176
Montgomery & West Point R. R. Co. v. Boring, 51 Ga. 582..... 451
Moore v. U. S., 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996.....190, 507
Morgan v. Campbell, 22 Wall. 381, 22 L. Ed. 796.....542, 543
Morgan v. Spangler, 20 Ohio St. 33.... 284
Morgan Envelope Co. v. Paper Co. (C. C.) 40 Fed. 577; 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500..... 653
Morier v. Railroad Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793..... 63

Digitized by Google

Page
Morison v. Moat, 9 Hare, 241, 263..163, 164
Morrissey v. Perry, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644.....662, 663, 664
Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143..... 597
Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405..... 238
Muller v. Eno, 14 N. Y. 605..... 429
Mulligan, In re (D. C.) 116 Fed. 715.... 544
Munn v. Illinois, 94 U. S. 113, 125, 126, 24 L. Ed. 77.....278, 280, 281
Murch v. Wright, 46 Ill. 488, 95 Am. Dec. 455..... 594
Murphy v. Ass'n, 38 App. Div. 426, 56 N. Y. Supp. 597..... 163
Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857..... 46
Murray v. Hardware Co., 138 Fed. 564, 71 C. C. A. 68..... 445
Mussina v. Cavazos, 6 Wall. 355, 18 L. Ed. 810.....338, 339
Mutual Ins. Co. v. Hill, 193 U. S. 551, 553, 24 Sup. Ct. 538, 48 L. Ed. 788.. 337
Mutual Life Co. v. Phinney, 178 U. S. 327, 335, 20 Sup. Ct. 906, 44 L. Ed. 1088 338

Nashville, etc., R. Co. v. McConnell (C. C.) 82 Fed. 65..... 165
National Biscuit Co. v. Nolan, 138 Fed. 6, 9, 10, 70 C. C. A. 436..... 394
National Enameling & Stamping Co. v. Enameling Co., 80 C. C. A. 485, 151 Fed. 19..... 359
National Phonograph Co. v. Schlegel, 128 Fed. 733, 64 C. C. A. 594.....161, 162
National Refining Co. v. Willis, 143 Fed. 107, 74 C. C. A. 301..... 86
National Steel Co. v. Lowe, 127 Fed. 311, 62 C. C. A. 229..... 86
National Tel. News Co. v. Telegraph Co., 119 Fed. 294, 56 C. C. A. 198..... 165
Navigation Co. v. Winsor, 20 Wall. (U. S.) 64, 22 L. Ed. 315..... 175
Nelson v. Haywood Co., 91 Tenn. 596, 20 S. W. 1..... 40
New Bedford R. R. Co. v. Railroad Co., 120 Mass. 397.....451, 453
Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085..... 19
New Dunderberg Min. Co. v. Old, 38 C. C. A. 89, 94, 97 Fed. 150, 155....150, 580
New Haven & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 398, 26 Sup. Ct. 272, 50 L. Ed. 515 155
New Orleans Cotton Exch. v. Railroad Co., 41 Interstate Commerce Commission R. 694, 699..... 147
Newport News & M. V. R. Co. v. Howe, 52 Fed. 362, 2 C. C. A. 121..... 84
New York, City of, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84..... 571
New York, The, 175 U. S. 187, 207, 20 Sup. Ct. 67, 44 L. Ed. 126..... 334
New York Bank Note Co. v. Bank Note Co., 180 N. Y. 280, 294, 295, 73 N. E. 48 173
New York Economical Printing Co., In re, 45 C. C. A. 665, 106 Fed. 839..... 233
New York Filter Mfg. Co. v. Building Co. (C. C.) 93 Fed. 827..... 355
N. Y. Pr. Ex. v. Railroad Co., 3 Interst. Com. Com'n R. 137..... 147

Page
Niagara, The (D. C.) 31 Fed. 163..... 346
Noah v. U. S., 128 Fed. 272, 62 C. C. A. 618 188
Nordenfeldt v. Maxim Nordenfeldt Co., 1894, App. Cases, 535, 567..... 177
Norfolk & W. R. Co. v. Williams, 89 Va. 165, 15 S. E. 522..... 195
Norris v. Jackson, 9 Wall. (U. S.) 125, 19 L. Ed. 603..... 521
North Carolina Car Co., In re (D. C.) 127 Fed. 178..... 560
Northern Lumber Co. v. O'Brien, 71 C. C. A. 598, 139 Fed. 614..... 51
Northern Pac. R. Co. v. Amato (C. C.) 49 Fed. 881..... 339
Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999.. 84
Northern Pac. R. Co. v. Cummiskey, 70 C. C. A. 92, 97, 137 Fed. 508, 513.... 194
Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755..245, 402
Northern Pac. R. Co. v. Lamont, 69 Fed. 73, 16 C. C. A. 364..... 559
Northern Pac. R. Co. v. Paine, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513....43, 44
Northern Pac. R. Co. v. Poirier, 167 U. S. 48, 54, 17 Sup. Ct. 741, 42 L. Ed. 72 197
Northern Pac. R. Co. v. Smith, 171 U. S. 260, 270, 18 Sup. Ct. 794, 43 L. Ed. 157 473
Northern Queen, The (D. C.) 117 Fed. 906-908, 914, 915..... 335
Northern R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977..... 400
Northrup v. Insurance Co., 47 Mo. 435, 4 Am. Rep. 337..... 409
Nye, In re, 66 C. C. A. 139, 133 Fed. 33 235

Oceano, The, 3 Prob. Div. 60..... 567
Ohio Falls, etc., Co. v. Trust Co., 71 Fed. 916, 18 C. C. A. 386.....535, 540
Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21 190
Omaha Water Co. v. Omaha, 77 C. C. A. 267, 147 Fed. 1, 13.....145, 152
Omaha & Republican V. R. Co. v. Crow, 54 Neb. 747, 750, 74 N. W. 1066, 69 Am. St. Rep. 741..... 33
O'Neil v. Hanscom, 175 Mass. 313, 56 N. E. 587..... 400
Orchard v. Alexander, 157 U. S. 385, 15 Sup. Ct. 635, 39 L. Ed. 737..... 187
Oregon Short Line v. Navigation Co. (C. C.) 51 Fed. 611..... 281
Oregon, The, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943.....571, 659
Orhanovich v. Steam Tug America, 4 Fed. 337-341..... 564
Origet v. Hedden, 155 U. S. 228, 235, 15 Sup. Ct. 92, 39 L. Ed. 130..... 307
Origet v. U. S., 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743..... 612
Orleans v. Platt, 99 U. S. 676, 25 L. Ed. 404 48
Osceola, The, 189 U. S. 158-175, 23 Sup. Ct. 483, 47 L. Ed. 760.....525, 526
Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154.....222, 223

Paddock v. Davenport, 107 N. C. 710, 12 S. E. 464..... 364

Digitized by Google

Page

Paddock v. Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254..... 409
Paine v. Griffiths, 86 Fed. 455, 30 C. C. A. 182..... 299
Palliser, In re, 136 U. S. 257, 267, 10 Sup. Ct. 1034, 34 L. Ed. 514..... 142
Parker v. Winnipiseogee, etc., Co., 2 Black. 545, 17 L. Ed. 333..... 577
Park & Sons Co. v. Ass'n, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578.....168, 169, 170, 171
Parsons v. Venzke, 164 U. S. 89, 92, 17 Sup. Ct. 27, 41 L. Ed. 360..... 51
Patria, The, 132 Fed. 971, 972, 68 C. C. A. 397..... 442
Patterson v. U. S., 2 Wheat. (U. S.) 221, 4 L. Ed. 224..... 521
Patton v. Railroad Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.....117, 194, 433
Paul v. Cullum, 132 U. S. 539, 550, 10 Sup. Ct. 151, 33 L. Ed. 430..... 481
Paxson v. Brown, 10 C. C. A. 135, 144, 61 Fed. 874, 879..... 94
Peabody v. Norfolk, 98 Mass. 452, 458, 96 Am. Dec. 664..... 163
Peabody v. Stark, 16 Wall. 240, 243, 21 L. Ed. 311..... 207
Pearson v. Carson, 69 Mo. 550..... 593
Pease, In re (D. C.) 129 Fed. 447, 448..96, 97
Pederson v. Spreckles, 87 Fed. 938-944, 31 C. C. A. 308..... 330
Peeke, Ex parte (D. C.) 144 Fed. 1018.. 341
Pekin Plow Co., In re, 50 C. C. A. 257, 259, 112 Fed. 308, 310..... 238
Pennock v. Coe, 23 How. (U. S.) 117, 127, 16 L. Ed. 436..... 312
Pennsylvania, The, 19 Wall. (U. S.) 136, 22 L. Ed. 148..... 113
Pennsylvania v. Bridge Co., 18 How. 421, 434, 15 L. Ed. 435..... 149
Pennsylvania Co. v. Bay (C. C.) 138 Fed. 203 267
Pennsylvania Co. v. Fishback, 123 Fed. 465, 59 C. C. A. 269..... 85
People v. Burke, 11 Wend. (N. Y.) 129.. 129
People v. Sheldon, 139 N. Y. 251, 264, 34 N. E. 785, 789, 23 L. R. A. 221, 36 Am. St. Rep. 690..... 179
People v. Sullivan, 33 Pac. 701, 702, 704, 9 Utah, 195..... 140
Petry v. U. S. (C. C.) 99 Fed. 261..... 626
Pettibone v. U. S., 148 U. S. 197, 203, 13 Sup. Ct. 542, 37 L. Ed. 419.....52, 151
Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775 213
Peyton v. Desmond, 63 C. C. A. 651, 662, 129 Fed. 1, 12..... 54
Philadelphia & Reading R. Co. v. Derby, 14 How. 468, 486, 14 L. Ed. 502..... 30
Pierce v. Van Dusen, 78 Fed. 695, 24 C. C. A. 280, 69 L. R. A. 705..... 84
Pirie v. Trust Co., 182 U. S. 438, 444, 446, 21 Sup. Ct. 906, 45 L. Ed. 1171..97, 517
Pittsburg, Ft. W. & C. R. Co. v. Devinny, 17 Ohio St. 198..... 84
Pittsburgh Plate Glass Co. v. Edwards, 78 C. C. A. 191, 148 Fed. 377..... 97
Platt v. Hitchcock Co., 71 C. C. A. 649, 139 Fed. 929..... 45

Page

Platt v. Vermillion, 99 Fed. 356, 39 C. C. A. 555..... 16
Pleasant Tp. v. Ætna Co., 138 U. S. 67, 72, 11 Sup. Ct. 215, 34 L. Ed. 864.... 221
Plummer v. Hillside Co., 160 Pa. 483, 494, 28 Atl. 853..... 298
Plymothean, The, 168 U. S. 410, 418, 423, 18 Sup. Ct. 149, 42 L. Ed. 519.....567, 571
Polleys v. Black River Co., 113 U. S. 81, 5 Sup. Ct. 369, 28 L. Ed. 938....75, 338
Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 557..... 97
Pond-Decker Lumber Co. v. Spencer, 30 C. C. A. 430, 86 Fed. 846..... 153
Post v. Sup'rs, 105 U. S. 667, 26 L. Ed. 1204 .....38, 221, 222, 223
Powell v. Construction Co., 88 Tenn. 692, 701, 13 S. W. 691, 17 Am. St. Rep. 925 64
Prairie State Bank v. U. S., 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412.... 104
Prater v. Campbell, 110 Ky. 23, 60 S. W. 918..... 173
Prentice v. Zane's Adm'r, 8 How. (U. S.) 470, 484, 12 L. Ed. 1160.....521, 522
Price v. Pankhurst, 3 C. C. A. 551, 53 Fed. 312..... 150
Providence, The, 98 Fed. 135, 38 C. C. A. 670..... 564
Pullman v. Kinsinger, 2 Abb. (U. S.) 94, Fed. Cas. No. 11,463..... 523

Quarman v. Burnett, 6 M. & W. 499.... 64

Railroad v. Bishard, 78 C. C. A. 62, 147 Fed. 496..... 464
Railroad Co. v. Camp, 65 Fed. 952, 13 C. C. A. 233..... 84
Railroad Co. v. Clowes, 93 Va. 189, 24 S. E. 833..... 464
Railroad Co. v. Georgia, 98 U. S. 359, 25 L. Ed. 185..... 450
Railroad Co. v. Hinsdale, 45 Ohio St. 556, 557, 572, 15 N. E. 665..... 450
Railroad Co. v. Lewis, 145 Ill. 67, 33 N. E. 960; 33 Ohio St. 196..... 464
Railroad Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593..... 462
Railroad Co. v. Quigley, 21 How. 202, 16 L. Ed. 73..... 323
Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165.....534, 544
Rayl v. Rayl, 58 Kan. 585, 50 Pac. 501.... 414, 416
Reaves, Ex parte (C. C.) 121 Fed. 848.. 665
Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305..... 528
Rees v. Watertown, 19 Wall. 107, 121, 22 L. Ed. 72..... 153
Reeves v. Kimball, 40 N. Y. 299.....458, 460
Resurrection Gold Min. Co. v. Mining Co., 64 C. C. A. 180, 189, 129 Fed. 668.. 4
Reynolds, In re, Fed. Cas. No. 11,723.... 546
Reynolds v. U. S., 98 U. S. 145, 167, 25 L. Ed. 244..... 157
Richard, In re (D. C.) 104 Fed. 792..... 544
Richards v. State, 65 Neb. 808, 812, 91 N. W. 878..... 42
Richardson v. Lowe, 79 C. C. A. 317, 149 Fed. 625 349

Digitized by Google

Page
Richmond, The (D. C.) 114 Fed. 208, 213.. 334
Richter, In re (D. C.) 100 Fed. 295, 298.. 139
Riggles v. Erney, 154 U. S. 244, 14 Sup. Ct. 1063, 38 L. Ed. 976..... 487
Rippstein v. Insurance Co., 57 Mo. 86... 409
Roberts v. Langenbach, 56 C. C. A. 253, 119 Fed. 349..... 409
Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579.....409, 410
Roberts v. Railroad Co., 158 U. S. 1, 10, 11, 15 Sup. Ct. 756, 39 L. Ed. 873..... 473
Rochford, In re, 59 C. C. A. 388, 124 Fed. 182..... 458
Rockefeller v. Thompson, 2 Sandf. 395 (N. Y. Super. Ct.)..... 347
Rodgers, In re, 60 C. C. A. 567, 578, 125 Fed. 169, 180..... 238
Roeber, In re (D. C.) 121 Fed. 444..... 543
Rogers v. Marsh, 73 Mo. 64..... 409
Rogers v. Railroad Co., 31 S. C. 378, 9 S. E. 1059..... 67
Rome Planing Mill, In re, 96 Fed. 813.. 211
Root v. Railroad Co., 105 U. S. 189, 26 L. Ed. 975..... 354
Rose v. Hayden, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145..... 415
Ross v. Duval, 13 Pet. 45, 48, 10 L. Ed. 51 218
Ross v. Parks, 93 Ala. 153, 8 South. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47.... 363
Rourke v. Colliery Co., 2 C. P. Div. 205.. 30
Rouse, Hazard & Co., In re, 91 Fed. 96, 33 C. C. A. 356..... 547
Rowan v. Runnels, 5 How. 134, 139, 12 L. Ed. 85..... 224
Rupp v. Elliott, 131 Fed. 730, 65 C. C. A. 544 161

Sabin v. Fuel Co., 34 Pac. 692, 695, 25 Or. 15, 42 Am. St. Rep. 756..... 95
Sage v. Railroad Co., 93 U. S. 412-417, 23 L. Ed. 933..... 77
St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936..... 6
St. Louis v. Rutz, 138 U. S. 226, 241, 11 Sup. Ct. 337, 34 L. Ed. 941..... 530
St. Louis, I. M. & S. R. Co. v. Spencer, 18 C. C. A. 114, 116, 71 Fed. 93, 95.... 150
St. Louis Southwestern R. Co. v. Cannon (Tex. Civ. App.) 81 S. W. 778..... 18
St. Louis & S. F. R. Co. v. Bishard, 78 C. C. A. 62, 147 Fed. 496, 498..... 198
Sale Creek Coal & Coke Co. v. Priddy, (Tenn.) 96 S. W. 610..... 89
Salt v. U. S. (C. C.) 127 Fed. 890, 134 Fed. 1021, 58 C. C. A. 442..... 202
Sanderlin, In re (D. C.) 109 Fed. 857.. 96
Sanford Fork & Tool Co., In re, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414..... 304
Sass v. Thomas, 64 S. W. 528, 3 Ind. T. 536, 89 S. W. 656..... 19
Sawyer Spindle Co. v. Turner (C. C.) 55 Fed. 979..... 355
Scarborough v. Pargoud, 108 U. S. 567, 2 Sup. Ct. 877, 27 L. Ed. 824.....76, 338
Scioto, The, 2 Ware (Dav. 359) 360, Fed. Cas. No. 12,508..... 336
Scott v. Carew, 196 U. S. 100, 109, 25 Sup. Ct. 193, 49 L. Ed. 403..... 51

Page
Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 963..... 423
Seanor v. McLaughlin, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467..... 595
Seattle L. S. & E. R. Co. v. Trust Co., 79 Fed. 179, 24 C. C. A. 512..... 487
Seibert v. Lewis, 122 U. S. 284, 295, 7 Sup. Ct. 1190, 30 L. Ed. 1161..... 154
Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609..... 460
Schermerhorn, In re, 76 C. C. A. 215, 145 Fed. 341..... 238
School Dist. v. Chapman, 152 Fed. 887, 82 C. C. A. 35..... 53
School Dist. v. Hall, 106 U. S. 428, 1 Sup. Ct. 417, 27 L. Ed. 237..... 77
School Dist. v. Holmes, 16 Neb. 486, 20 N. W. 721..... 43
Sheen, Ex parte, 6 Ch. D. (1877) 235..478, 480
Shelton v. Surety Co. (C. C.) 127 Fed. 736; 131 Fed. 210, 66 C. C. A. 94..... 104
Sheppard v. Graves, 14 How. 505, 14 L. Ed. 518..... 409
Sherlock v. Bainbridge, 41 Ind. 35, 13 Am. Rep. 302..... 281
Shields v. Ohio, 95 U. S. 319, 24 L. Ed. 357 450
Shilitto v. Thacker, 43 Ohio St. 63, 1 N. E. 438..... 613
Shiver v. U. S., 159 U. S. 491, 497, 16 Sup. Ct. 54, 40 L. Ed. 231..... 54
Shreve v. Cheesman, 16 C. C. A. 413, 416, 69 Fed. 785, 788..... 146
Shropshire-Woodliff Co. v. Bush, 27 Sup. Ct. 178, 204 U. S. 186, 51 L. Ed. 436..537, 560
Siemens v. Sellers, 123 U. S. 276, 283, 8 Sup. Ct. 117, 31 L. Ed. 153.....632, 635
Silvia, The, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241..... 675
Singer Mfg. Co. v. Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.... 172
Singer Mfg. Co. v. Rahn, 132 U. S. 518, 522, 10 Sup. Ct. 175, 33 L. Ed. 440....30, 32
Sisters, The, 14 L. T. N. S. 338..... 571
Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102, 110, 117 668
Slade v. Drake, Hob. 295..... 249
Slater, Ex parte, 72 Mo. 102..... 141
Slaughter's Adm'r v. Gerson, 13 Wall. 379, 20 L. Ed. 627..... 494
Slawson v. Railroad Co., 107 U. S. 649, 652, 2 Sup. Ct. 663, 27 L. Ed. 576..... 358
Slide & Spur Gold Mines v. Seymour, 153 U. S. 509, 14 Sup. Ct. 842, 38 L. Ed. 802 81
Slingsby, The, 120 Fed. 748, 57 C. C. A. 52 64
Slomka, In re (D. C.) 117 Fed. 688..... 547
Smathers v. Com'rs, 125 N. C. 480, 34 S. E. 554..... 220
Smelting Co. v. Kemp, 104 U. S. 636, 641, 26 L. Ed. 875..... 51
Smith v. Au Gres Tp., 80 C. C. A. 145, 150 Fed. 257..... 578
Smith v. Railroad Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550..... 18
Smith v. Wells, 4 Bush (Ky.) 92.....537, 557
Smith v. Williams, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220..... 173

Digitized by Google

Page

Solomon v. Davenport, 87 Fed. 318, 30 C. C. A. 664 664
Sonn v. Magone, 159 U. S. 417, 16 Sup. Ct. 67, 40 L. Ed. 203 627
South Carolina v. Georgia, 93 U. S. 4, 13, 23 L. Ed. 782 149
Southern Pac. Co. v. Interstate Commerce Commission, 200 U. S. 536, 554, 26 Sup. Ct. 330, 50 L. Ed. 585 152
Southern Pac. R. Co. v. Maloney, 69 C. C. A. 83, 136 Fed. 171 18
Southern Pac. Co. v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485 194
Southern R. Co. v. Bouknight, 70 Fed. 442, 446, 17 C. C. A. 181, 185, 30 L. R. A. 823 154
Southern R. Co. v. Harrison, 24 South. 552, 554, 119 Ala. 539, 43 L. R. A. 385, 72 Am. St. Rep. 936 152
South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154 88
Southwark, The, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65 673
Sparhawk v. Yerkes, 142 U. S. 1, 13, 12 Sup. Ct. 104, 35 L. Ed. 915 460
Spencer's Case, 3 Resolution, 5 Coke, 16 173
Sperry & Hutchinson Co. v. Clothing Co. (C. C.) 135 Fed. 833 165
Splidt v. Bowles, 10 East, 279, 282 173
Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397-407, 24 Sup. Ct. 376, 48 L. Ed. 496 182
Sprinkle v. U. S., 141 Fed. 811, 73 C. C. A. 285 2
Standard Fireproofing Co. v. St. Louis Co., 177 Mo. 559, 76 S. W. 1008 168
Standard Oil Co. v. Doyle (Ky.) 82 S. W. 271 268
Stanley Co. v. Coler, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126 220
State v. Abbott, 80 N. W. 499, 59 Neb. 106 39
State v. Anderson, 191 Mo. 134, 144, 145, 90 S. W. 95 141
State v. Babcock, 23 Neb. 123, 36 N. W. 348 42
State v. Bailey, 36 N. E. 233, 236, 50 Ohio St. 636 139
State v. Bemis, 45 Neb. 724, 64 N. W. 348 42
State v. Denton, 46 Tenn. 539 141
State v. Frank, 60 Neb. 327, 333, 83 N. W. 74, 75 39
State v. Goodson, 107 N. C. 798, 12 S. E. 329 ..... 4, 8
State v. Hatch, 91 Mo. 568 141
State v. Hill, 47 Neb. 456, 497, 66 N. W. 541 44
State v. Huegin (Wis.) 85 N. W. 1046, 62 L. R. A. 700 268
State v. Hughes, 58 Iowa, 165, 169, 11 N. W. 706 157
State v. Jones, 93 N. C. 611 4
State v. Kearney, 49 Neb. 325, 68 N. W. 533 42
State v. Liedtke, 9 Neb. 490, 4 N. W. 63 39
State v. McGraw, 87 Mo. 161 141
State v. Massey, 86 N. C. 658, 41 Am. Rep. 478 ..... 4, 7
State v. Mikle, 81 N. C. 552 4

Page

State v. Patterson, 98 N. C. 660, 4 S. E. 350 222
State v. Railroad Co., 60 Neb. 741, 746, 748, 84 N. W. 254 ..... 39, 40, 41
State v. Smiley, 98 Mo. 605, 12 S. W. 247 141
State v. Smith, 66 Mo. 61, 62 139
State v. Wahoo, 62 Neb. 40, 86 N. W. 923 42
State v. Zichfield, 46 Pac. 802, 805, 806, 23 Nev. 304, 34 L. R. A. 784, 62 Am. St. Rep. 800 157
State Bank of Chicago v. Cox, 74 C. C. A. 285, 143 Fed. 91 238
State ex inf. v. Vallins, 140 Mo. 523, 41 S. W. 887 410
State ex rel. Pearman v. Liedtke, 9 Neb. 490, 4 N. W. 75 38
State ex rel. Wahoo Water-Works Co. v. Wahoo, 62 Neb. 40, 86 N. W. 923 39
State ex rel. Yeoman v. Hoshaw, 98 Mo. 358, 11 S. W. 759 593
Steam Nav. Co. v. Bolt, 6 Com. Bench N. S. 550 104
Steele v. Buel, 44 C. C. A. 287, 104 Fed. 968 233
Steele v. Smelting Co., 106 U. S. 447, 453, 1 Sup. Ct. 389, 27 L. Ed. 226 51
Stenton v. Jerome, 54 N. Y. 480 669
Stevens v. Clark, 62 Fed. 321, 10 C. C. A. 379 76
Stewart v. Dunham, 115 U. S. 61, 66, 5 Sup. Ct. 1163, 29 L. Ed. 329 95
Stewart v. Lansing, 15 Blatchf. 281, Fed. Cas. No. 13,432; 104 U. S. 505, 26 L. Ed. 866 ..... 46, 47
Stillman v. Mfg. Co., 3 Woodb. & Min. 538, Fed. Cas. No. 13,446 139
Stone v. Sargent, 129 Mass. 503, 512 406
Straus v. Ass'n, 177 N. Y. 473, 477, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819 170
Streeter v. Sanitary Dist., 133 Fed. 124, 66 C. C. A. 190 ..... 619, 620
Stuart v. Hayden, 18 C. C. A. 618, 622, 72 Fed. 402, 406 94
Studer v. Bleistein, 115 N. Y. 317, 22 N. E. 243, 5 L. R. A. 702 528
Styria, The, 101 Fed. 728, 41 C. C. A. 639 430
Suggett's Adm'r v. Carson's Adm'r, 26 Mo. 221 459
Sunnyside, The, 1 Brown's Adm. 227, Fed. Cas. No. 13,620 571
Supervisors v. U. S., 4 Wall. 435, 18 L. Ed. 419 58
Suydam v. Williamson, 20 How. (U. S.) 427, 441, 15 L. Ed. 978 522
Swain v. Seamans, 9 Wall. 254, 19 L. Ed. 554 459
Swart v. Kimball, 43 Mich. 443, 5 N. W. 635 141
Swift, In re, 105 Fed. 493, 5 Am. Bankr. Rep. 335, affirmed 112 Fed. 315, 50 C. C. A. 264, 7 Am. Bankr. Rep. 375 669

Tabor v. Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740 ..... 163, 164
Taddy Co. v. Sterions Co., 73 Law Journal, 1904, Ch. Div. 191 173

Digitized by Google

Page

Taggart v. Steel Co., 141 Fed. 910, 73 C. C. A. 144 65
Tariffs on Export & Import Traffic, In re, 10 Interst. Commerce Commission R. 55, 63, 64, 66, 68, 76, 81 147
Taylor v. Railroad Co., 88 Fed. 537, 31 C. C. A. 537 60
Texas & P. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136 .... 117, 121, 432, 433
Texas & P. R. Co. v. Gardner, 52 C. C. A. 142, 114 Fed. 186 13
Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 211, 212, 220, 16 Sup. Ct. 666, 40 L. Ed. 940 ..... 144, 147
Texas & P. R. Co. v. Mugg, 202 U. S. 242, 245, 26 Sup. Ct. 628, 50 L. Ed. 1011 152
Thelusson v. Smith, 2 Wheat. 396, 4 L. Ed. 271 548
Thomas v. Grand Junction, 13 Colo. App. 80, 84, 85, 56 Pac. 665 599
Thomas v. Sass, 64 S. W. 531, 3 Ind. T. 545 20
Thompson v. Crocker, 9 Pick. (Mass.) 59 139
Thompson v. Fairbanks, 196 U. S. 516, 526, 25 Sup. Ct. 306, 49 L. Ed. 577 ..... 98, 238, 459
Thomson v. Dean, 7 Wall. (U. S.) 342, 19 L. Ed. 94 255
Thomson-Houston Co. v. Brass Co., 80 Fed. 712, 724, 26 C. C. A. 107 635
Thornhill v. Bank, Fed. Cas. No. 13,992 546
Threadgill v. Platt (C. C.) 71 Fed. 1 76
Throckmorton v. Holt, 180 U. S. 552, 557, 21 Sup. Ct. 474, 476, 45 L. Ed. 663 398
Tidewater Co. v. U. S., 171 U. S. 210, 216, 18 Sup. Ct. 837, 43 L. Ed. 139 203
Tilghman v. Proctor, 125 U. S. 136, 149, 150, 8 Sup. Ct. 894, 31 L. Ed 664..94, 564
Tobin v. Young, 124 Ind. 507, 24 N. E. 121 20
Tode v. Gross, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 653, 24 Am. St. Rep. 475 174
Tollman v. Board, 145 Fed. 753, 763, 764, 76 C. C. A. 317 ..... 219, 220, 224
Tolsen Case, 139 U. S. 555, 11 Sup. Ct. 653, 35 L. Ed. 270 513
Topliff, In re, 114 Fed. 323, 8 Am. Bankr. Rep. 141 669
Town of Nahant v. U. S., 136 Fed. 273, 283, 284, 70 C. C. A. 641, 69 L. R. A. 723 474
Town of Pawlet v. Railroad Co., 28 Vt. 297, 300 30
Town of South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154 221
Townsend v. Railroad Co., 101 Fed. 757, 761, 42 C. C. A. 570 259
Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383 487
Tracy v. Iron Works Co., 104 Mo. 193, 16 S. W. 203 593
Transportation Co. v. Parkersburg, 107 U. S. 691, 699, 2 Sup. Ct. 732, 739, 27 L. Ed. 584 ..... 279, 280, 281
Treat v. Staples, Holmes, 1, Fed. Cas. No. 14,162 523

Page

Tregea v. Irrigation Dist., 164 U. S. 179, 187, 17 Sup. Ct. 52, 41 L. Ed. 395 48
Trim, In re, Fed. Cas. No. 14,174 .... 539, 542
Trust Co. v. Walker, 107 U. S. 596, 2 Sup. Ct. 299, 27 L. Ed. 490 ..... 537, 559
Turk v. Carnahan, 25 Ind. App. 125, 57 N. E. 729, 81 Am. St. Rep. 85 397
Turner v. Harvey, Jacob's Reports, 178 495
Turpin v. Burgess, 117 U. S. 504, 506, 6 Sup. Ct. 835, 29 L. Ed. 988 148

U. St. Dudley & Co. v. U. S. (C. C.) 148 Fed. 333 627
Umbria, The, 166 U. S. 404, 409, 17 Sup. Ct. 610, 41 L. Ed. 1053 571
Union Bank of Richmond v. Railroad Co., 74 C. C. A. 323, 143 Fed. 193 609
Union Bluestone Co. Case, 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655 171
Union Cent. Life Ins. Co. v. Champlin, 54 C. C. A. 208, 210, 116 Fed. 858, 860.. 145
Union Ins. Co. v. Smith, 124 U. S. 405, 423, 424, 8 Sup. Ct. 534, 31 L. Ed. 497.. 398
Union Pac. R. Co. v. Callahan, 161 U. S. 91, 16 Sup. Ct. 493, 40 L. Ed. 628 86
Union Pac. R. Co. v. Sprague, 69 Neb. 48, 95 N. W. 46 41
Union Switch & Signal Co. v. Railroad Co. (C. C.) 75 Fed. 1004 654
Union Trust Co., In re, 122 Fed. 937, 59 C. C. A. 461 229
U. S. v. Anthony, 24 Fed. Cas. 829, 831, 833, No. 14,459 157
U. S. v. Baxter, 51 Fed. 624, 2 C. C. A. 410 76
U. S. v. Benson, 17 C. C. A. 293, 298, 70 Fed. 591, 596 52
U. S. v. Brewer, 139 U. S. 278, 288, 11 Sup. Ct. 538, 35 L. Ed. 190 146
U. S. v. Britton, 107 U. S. 655, 669, 670, 2 Sup. Ct. 512, 27 L. Ed. 520; 108 U. S. 199-205, 2 Sup. Ct. 531, 534, 27 L. Ed. 698 ..... 52, 151, 183
U. S. v. Budd, 144 U. S. 167, 12 Sup. Ct. 575, 36 L. Ed. 384 189
U. S. v. California, etc., Co., 148 U. S. 31, 38, 13 Sup. Ct. 458, 37 L. Ed. 354 303
U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135 151
U. S. v. Conrad (C. C.) 59 Fed. 458, 462, 463 141
U. S. v. Cook, 17 Wall. 168, 174, 21 L. Ed. 538 151
U. S. v. Cruickshank, 92 U. S. 542, 558, 23 L. Ed. 588 ..... 52, 151
U. S. v. Daubner (D. C.) 17 Fed. 793.. 4
U. S. v. Dennee, 25 Fed. Cas. 818, No. 14,948 52
U. S. v. Dudley, 174 U. S. 670, 678, 19 Sup. Ct. 801, 43 L. Ed. 1129 203
U. S. v. Dustin, 25 Fed. Cas. 944, No. 15,011 52
U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591 187
U. S. v. Eddy (C. C.) 134 Fed. 114 188
U. S. v. Finnell, 185 U. S. 144, 236, 244, 22 Sup. Ct. 633, 636, 46 L. Ed. 890 207
U. S. v. Fisher, 2 Cranch, 358, 2 L. Ed. 304 547

Digitized by Google

Page

U. S. v. Fowkes, 3 C. C. A. 394, 398, 53 Fed. 13, 17 140
U. S. v. Gordon (D. C.) 22 Fed. 250 52
U. S. v. Hanley (D. C.) 71 Fed. 672, 676 150
U. S. v. Healey, 160 U. S. 136, 145, 16 Sup. Ct. 247, 40 L. Ed. 369 206
U. S. v. Hess, 124 U. S. 483, 488, 8 Sup. Ct. 571, 31 L. Ed. 516 151
U. S. v. Howard (D. C.) 132 Fed. 350, 351 188
U. S. v. Johnson, 152 Fed. 164, 81 C. C. A. 416 628
U. S. v. Mackintosh, 29 C. C. A. 176, 85 Fed. 333 51
U. S. v. Minor, 114 U. S. 233, 240, 5 Sup. Ct. 836, 29 L. Ed. 110 51
U. S. v. Moore, 95 U. S. 760, 763, 24 L. Ed. 588 206
U. S. v. Patterson (C. C.) 29 Fed. 775 .. 341
U. S. v. Peck, 102 U. S. 64, 26 L. Ed. 46 530
U. S. v. Pipe Co., 85 Fed. 275, 29 C. C. A. 141, 46 L. R. A. 122 ..... 174, 176
U. S. v. Pridgeon, 153 U. S. 62, 14 Sup. Ct. 746, 38 L. Ed. 631 ..... 342, 343
U. S. v. Proctor, 145 Fed. 126, 131, 132, 76 C. C. A. 96 ..... 203, 206, 207
U. S. v. Railroad Co., 142 U. S. 615, 621, 12 Sup. Ct. 306, 35 L. Ed. 1134; 160 U. S. 668, 685, 16 Sup. Ct. 427, 40 L. Ed. 576 ..... 206, 207, 474
U. S. v. Reaves, 126 Fed. 127, 60 C. C. A. 675 662
U. S. v. Rhodes (C. C.) 30 Fed. 431 188
U. S. v. Ried, Murdoch & Co., 120 Fed. 242, 56 C. C. A. 538 656
U. S. v. St. Louis, 184 U. S. 247, 255, 22 Sup. Ct. 350, 46 L. Ed. 520 336
U. S. v. Simmons, 96 U. S. 360, 24 L. Ed. 819 151
U. S. v. Stevens (D. C.) 44 Fed. 141 188
U. S. v. Tozer, 37 Fed. 635, 637, 2 L. R. A. 444 151
U. S. v. Winona, etc., Co., 15 C. C. A. 96, 103, 67 Fed. 948 51
United States Min. Co. v. Lawson, 67 C. C. A. 587, 594, 134 Fed. 769, 776 303
Unitype Co. v. Long, 143 Fed. 315, 74 C. C. A. 453 595

Van Hoffman v. Quincy, 4 Wall. 535, 550, 18 L. Ed. 403 153
Van Horn v. Van Horn (N. J. Err. & App.) 28 Atl. 669 268
Van Stone v. Mfg. Co., 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961 ..... 18, 19
Van Zandt v. Bank, 79 C. C. A. 23, 149 Fed. 127 677
Veasey v. Carson, 177 Mass. 117, 58 N. E. 177, 53 L. R. A. 241 308
Velocity, The, L. R. 3 P. C. 44 567
Vicksburg & Meridian Railroad v. O'Brien, 119 U. S. 99, 103, 105, 7 Sup. Ct. 118, 30 L. Ed. 299 ..... 394, 398
Victor Co. v. The Fair, 123 Fed. 424, 61 C. C. A. 58 168
Victor Talking Mach. Co. v. The Fair, 123 Fed. 424, 428, 61 C. C. A. 58 ..... 161, 162, 169
Victory, The, 168 U. S. 410, 418, 423, 18 Sup. Ct. 149, 42 L. Ed. 519 .... 567, 571

Page

Village of Chester v. Leonard, 37 Atl. 397, 68 Conn. 495 104
Virginia, Ex parte, 100 U. S. 343, 25 L. Ed. 676 343
Virgo, The, 3 Prob. Div. 60 567
Vulcan Detinning Co. v. Contracting Co., 58 Atl. 290, 67 N. J. Eq. 243 163

Wabash R. R. Co. v. Propst, 92 Ill. App. 485 433
Wabash, etc., R. Co. v. Ham, 114 U. S. 587, 595, 5 Sup. Ct. 1081, 29 L. Ed. 235 450
Wachovia Loan & Trust Co. v. Board, 55 S. E. 442 ..... 218, 225
Waeber v. Talbot, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712 528
Waldron v. Waldron, 156 U. S. 361, 384, 389, 15 Sup. Ct. 383, 389, 39 L. Ed. 453 .. 76, 398, 399, 400
Walker v. Brown, 165 U. S. 653, 654, 656, 17 Sup. Ct. 453, 41 L. Ed. 865 ..... 312, 559
Walsh v. Dwight (Sup.) 58 N. Y. Supp. 91 171
Wall v. Goodenough, 16 Ill. 415 20
Walton v. Railroad Co., 70 Wis. 414, 418, 36 N. W. 10 473
Ward v. Brigham, 127 Mass. 24 480
Ward v. Cochran, 150 U. S. 597, 608, 14 Sup. Ct. 230, 37 L. Ed. 1195 522
Warn v. Oil Co. (D. C.) 61 Fed. 632 512
Warren v. Burt, 7 C. C. A. 105, 110, 58 Fed. 101, 106 94
Warren v. Railroad Co., 49 Ala. 582 451
Warren Co. v. Marcy, 97 U. S. 96, 24 L. Ed. 977 47
Washington, etc., Co. v. Patterson, 9 App. D. C. 423 18
Waters v. Fuel Co., 55 N. W. 52, 52 Minn. 474, 38 Am. St. Rep. 564 32
Watkins v. Wallace, 19 Mich. 57 579
Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719 ..... 460, 597
Weare v. Johnson, 20 Colo. 363, 38 Pac. 374 237
Webster v. Hastings, 59 Neb. 563, 568, 81 N. W. 510 39
Webster v. Railroad Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521 18
Welch v. Hubschmitt, 61 N. J. Law, 57, 38 Atl. 824 104
Wells v. Caywood, 3 Colo. 487 237
Wells v. People, 71 Ill. 532 665
Wells & Richardson Co. v. Abraham (C. C.) 146 Fed. 190 168
Werckmeister v. Lithographic Co., 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591 165
West v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098 211
Westcott Co. v. Berry, 4 Am. Bankr. Rep. 264, 45 Atl. 352, 69 N. H. 505 546
Western N. Y. & P. R. Co. v. Refining Co., 137 Fed. 343, 70 C. C. A. 23 619
Western Union Tel. Co. v. Burgess, 108 Fed. 26, 47 C. C. A. 168 36
Western & A. R. Co. v. Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655 18
Westinghouse Co. v. Instrument Co., 133 Fed. 174, 177, 179, 68 C. C. A. 523; 138 Fed. 823, 829, 71 C. C. A. 189 ..... 586, 635

Digitized by Google

Page

Westinghouse Electric Mfg. Co. v. Power Co., 108 Fed. 221; 113 Fed. 884, 51 C. C. A. 514; 117 Fed. 309; 119 Fed. 265; 124 Fed. 86; 129 Fed. 868, 71 C. C. A. 582..... 638
Westlund, In re (D. C.) 99 Fed. 399.... 559
Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682..... 323
Wheeler v. State, 24 Wis. 52..... 141
Wheeling Bridge & T. R. Co. v. Brewing Co., 90 Fed. 189, 32 C. C. A. 571.. 487
White v. A. W. Gray's Sons, 89 N. Y. Supp. 481..... 595
White v. Ewing, 69 Fed. 452, 16 C. C. A. 296 487
White v. Joyce, 158 U. S. 128, 146-149, 15 Sup. Ct. 788, 39 L. Ed. 921..... 231
White v. Walbridge (C. C.) 46 Fed. 526.. 355
White v. Wansey, 116 Fed. 345, 53 C. C. A. 634..... 578
Whitwell v. Tobacco Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689..173, 174
Wickliff v. Owings, 17 How. 47, 15 L. Ed. 44 323
Wilcox v. McConnell, 13 Pet. (U. S.) 498, 513, 10 L. Ed. 264..... 51
Wildcroft, The, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794..... 428
Wilkes Co. v. Coler, 180 U. S. 506, 513, 519, 520, 21 Sup. Ct. 458, 460, 463, 45 L. Ed. 642, 643.....221, 222
Willard v. White, 56 Hun, 581, 10 N. Y. Supp. 170..... 669
William F. Fisher & Co., In re (D. C.) 143 Fed. 907..... 412
Williams v. Railroad Co., 79 C. C. A. 146, 149 Fed. 104..... 28
Williams v. Williams, 3 Meriv. 157.... 163
Willison v. Watkins, 3 Pet. (U. S.) 42, 7 L. Ed. 596..... 20
Wilmore Coal Co. v. Brown (C. C.) 147 Fed. 931..... 296
Wills v. Storage Co. (C. C.) 147 Fed. 535 358
Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. Ed. 1141..... 653

Page

Wilson v. Trust Co., 114 Fed. 742, 52 C. C. A. 374..... 536
Winter v. Howell's Assignee, 109 Ky. 163, 58 S. W. 591.....535, 539
Winters v. Cherry, 78 Mo. 344, 349..... 459
Wisner, Ex parte, 27 Sup. Ct. Rep. 150, 51 L. Ed. 264..... 34
Wolf, In re (D. C.) 98 Fed. 84..... 96
Wolfson v. U. S., 101 Fed. 434, 41 C. C. A. 422..... 190
Wood v. Donovan, 132 Mass. 84..... 460
Wood v. U. S., 16 Pet. 342, 343, 360, 10 L. Ed. 987.....190, 507
Woodmanse & Hewitt Mfg. Co. v. Williams, 15 C. C. A. 520, 68 Fed. 489.... 354
Woodward v. Bank, 2 Colo. App. 369, 31 Pac. 184..... 237
Worcester Co., In re, 102 Fed. 808, 811, 812, 815, 42 C. C. A. 637, 641..... 231, 233, 532, 546, 547
Wright, In re (D. C.) 95 Fed. 807, 811.. 532, 544, 545, 546
Wrightman v. Boone Co., 31 C. C. A. 570, 572, 88 Fed. 435, 437..... 145
Wynne, In re, Fed. Cas. No. 18,117.... 536, 539, 542

Yeates v. Pryor, 11 Ark. 58..... 494
Yellow Poplar Lumber Co. v. Chapman, 74 Fed. 448, 450, 20 C. C. A. 507, 509... 610
Yocum v. Parker, 66 C. C. A. 80, 130 Fed. 770.....409, 410
York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782.... 98, 238, 459, 460
Young, In re (D. C.) 96 Fed. 606..... 534
Young v. Godbe, 15 Wall. 562, 21 L. Ed. 250 580
Young Men's Christian Ass'n v. Dubach, 82 Mo. 475..... 410

Zabriskie v. Railroad Co., 131 N. Y. 72, 29 N. E. 1006..... 528
Zeringue v. Railroad Co. (C. C.) 34 Fed. 239, 243..... 366

Digitized by Google

CASES ON REHEARING.

CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED.

Rannells v. Rowe.....74 C. C. A. 376
Rehearing denied, March 19, 1906.

Digitized by Google

INDEX TO NOTES.

VOLUMES 1-82.

ABANDONMENT.
Of trade-marks and trade-names. 33 C. C. A. 294.
Of railroad right of way. 42 C. C. A. 576.
Of water rights. 45 C. C. A. 190.
Of copyright. 69 C. C. A. 563.
Of invention. 70 C. C. A. 6.

ABATEMENT AND REVIVAL.
Pendency of action in state or federal court as ground for abatement of action in the other. 47 C. C. A. 205; 73 C. C. A. 521.

ACCIDENT INSURANCE.
Risks and causes of loss. 38 C. C. A. 3.

ACTIONS.
Jurisdiction of federal courts as restricted by state laws. 1 C. C. A. 514.
On insurance policy—Time of bringing suit. 2 C. C. A. 473; 35 C. C. A. 404.
Forms of action in federal courts—Following state practice. 5 C. C. A. 598.
Limitation of actions against corporate officers. 53 C. C. A. 7.
By and against receivers and "agents" of national banks. 53 C. C. A. 398.
Bar of action as determined by limitations of state other than that in which action is brought. 58 C. C. A. 186.
Satisfaction of one or more judgments for same cause of action. 67 C. C. A. 322.
Premature commencement of actions. 76 C. C. A. 159.

ADMIRALTY.
Nature of hearing on appeal—Admission of new proof. 3 C. C. A. 322.
Demurrage. 14 C. C. A. 657; 21 C. C. A. 337; 46 C. C. A. 4.
Extinguishment of maritime liens. 17 C. C. A. 102.
Jurisdiction as to matters of contract. 18 C. C. A. 347; 27 C. C. A. 530.
General average. 20 C. C. A. 357.
Jurisdiction to enforce liens under state laws. 21 C. C. A. 21.
Collision rules. 28 C. C. A. 532; 29 C. C. A. 368.
Salvage awards. 30 C. C. A. 280.
Signals of meeting vessels. 30 C. C. A. 630.
Negligence of both master and servant—Division of damages. 30 C. C. A. 678.

ADMIRALTY—Cont'd.
Jurisdiction of suits between foreigners. 37 C. C. A. 193.
Limitation of shipowner's liability. 45 C. C. A. 387.
Statutory exemptions of shipowners from liability. 49 C. C. A. 11.
Demise of vessel. 55 C. C. A. 225.
Collision—Overtaking vessels. 60 C. C. A. 254.
Jurisdiction of torts. 62 C. C. A. 279.
Liability of vessel for injuries caused by creation of swell. 78 C. C. A. 3.

ADVERSE POSSESSION.
Tax deed as color of title. 24 C. C. A. 402.
Acquisition or loss of right to railroad right of way by prescription. 63 C. C. A. 7.

ALIENS.
Citizenship under state and federal laws. 6 C. C. A. 37.
Citizenship of the Chinese. 1 C. C. A. 212; 35 C. C. A. 332.
Citizenship of married women. 65 C. C. A. 5.
Importation of contract labor. 66 C. C. A. 133.

ALTERATION OF INSTRUMENTS.
Discharge of surety by. 66 C. C. A. 6.

APPEAL.
In admiralty—New proofs. 3 C. C. A. 322.
Review of previous decisions as to validity of patents in circuit court of appeals. 3 C. C. A. 565; 27 C. C. A. 427; 32 C. C. A. 484.
Review of interlocutory decree granting or refusing injunction in patent case in circuit court of appeals. 3 C. C. A. 572; 27 C. C. A. 189; 32 C. C. A. 484.
When may be aided by mandamus. 10 C. C. A. 450.
Following state practice. 27 C. C. A. 394.
Finality of judgments and decrees for purposes of review. 2 C. C. A. 379; 17 C. C. A. 238; 28 C. C. A. 482.
Appeal and review in bankruptcy cases. 43 C. C. A. 9.
Appeal or mandamus. 47 C. C. A. 376.
Reduction or increase of amount of recovery on appeal. 48 C. C. A. 470.

Digitized by Google

APPEAL—Cont'd.
Additional proofs in appellate court without trial de novo. 67 C. C. A. 600.
Jurisdiction of lower court to rehear cause or grant new trial after remand by appellate court. 70 C. C. A. 416.
Enforcement of decree of appellate court by mandamus. 77 C. C. A. 409.
Amendment of writ of error, citation, or notice of proceedings for review. 77 C. C. A. 490.

APPEARANCE.
Following state practice. 5 C. C. A. 594.

ARBITRATION AND AWARD.
Arbitration as a condition of an insurance policy. 9 C. C. A. 628; 39 C. C. A. 389.
Setting aside an award for interest, prejudice, or misconduct of arbitrator. 12 C. C. A. 592.

ARGUMENTS.
Of counsel upon failure to produce witness. 13 C. C. A. 589.

ASSAULT AND BATTERY.
Mental suffering as element of damages. 11 C. C. A. 561.
Liability of corporations. 39 C. C. A. 14.

ASSIGNEES.
Citizenship as affecting the jurisdiction of the federal courts. 10 C. C. A. 254; 27 C. C. A. 302.

ASSIGNMENT.
Of right to use name as trade-mark. 17 C. C. A. 579; 27 C. C. A. 360.
Of claims against the United States and government contracts. 22 C. C. A. 650.
Liability of transferrors and transferees of corporate stock for assessments. 61 C. C. A. 322.
Of licenses for use or sale of patents. 64 C. C. A. 596.
Subrogation of insurer under assignment of rights of insured. 65 C. C. A. 615.

ASSIGNMENT FOR BENEFIT OF CREDITORS.
Power of corporation to make. 24 C. C. A. 221.
Effect of national bankruptcy act on state insolvency laws and on assignments for benefit of creditors. 51 C. C. A. 11.

ASSOCIATIONS.
Who may be parties in actions by or against associations. 82 C. C. A. 270.

ASSUMPTION OF RISK.
Assumption of risk incident to employment. 38 C. C. A. 314.

ATTACHMENT.
Issuance—Following state practice. 5 C. C. A. 606; 27 C. C. A. 393.

ATTORNEY AND CLIENT.
Arguments of counsel. 13 C. C. A. 589.
Bonds, securities, and other papers subject to lien for services. 32 C. C. A. 229.
Liability of attorneys for contempt. 48 C. C. A. 7.
Comments of counsel and instructions on failure of accused to testify. 54 C. C. A. 373.
Authority of attorney after judgment. 67 C. C. A. 130.
Compensation of attorney on premature termination of employment. 69 C. C. A. 113.
Expert testimony as to value of services. 74 C. C. A. 257.

AWARD.
Setting aside for interest, prejudice, or misconduct of arbitrator. 12 C. C. A. 592.

BAGGAGE.
Responsibility of sleeping-car companies for baggage and valuables. 10 C. C. A. 338.
Limitation of liability by carrier for passenger's baggage. 32 C. C. A. 308.

BANKRUPTCY.
Jurisdiction of federal courts in suits relating to bankruptcy. 11 C. C. A. 313.
What persons are subject to bankruptcy law. 42 C. C. A. 4.
Appeal and review in bankruptcy cases. 43 C. C. A. 9.
Franchises and licenses as assets in bankruptcy. 43 C. C. A. 389.
Effect of national bankruptcy act on state insolvency laws and on assignments for benefit of creditors. 51 C. C. A. 11.

BANKS AND BANKING.
Jurisdiction of federal courts in suits against national banks. 11 C. C. A. 315.
Who liable as shareholders in national banks. 15 C. C. A. 130; 46 C. C. A. 503.
Personal liability of directors. 12 C. C. A. 680; 33 C. C. A. 230.
Deposits in bank after insolvency. 43 C. C. A. 588.
Enforcement of statutory liability of stockholders in national banks. 52 C. C. A. 6.
Actions by and against receivers and "agents" of national banks. 53 C. C. A. 398.
Lien of banks on stock. 56 C. C. A. 179.

Digitized by Google

BANKS AND BANKING—Cont'd.
Taxation of bank deposits. 60 C. C. A. 413.
Right to proceeds of collection on insolvency of collecting bank. 69 C. C. A. 333.

BILLS OF LADING.
Perils of the sea. 19 C. C. A. 465.

BOARDS OF TRADE.
Quotations of prices and transactions on exchanges. 61 C. C. A. 2.

BONDS.
Bona fide purchasers of municipal bonds. 41 C. C. A. 6.
Death of surety. 49 C. C. A. 591.
Rights and remedies of holders of invalid municipal securities. 66 C. C. A. 235.

BREACH OF MARRIAGE PROMISE.
Effect of existing marriage on subsequent contract to marry. 50 C. C. A. 583.

BUILDING AND LOAN ASSOCIATIONS.
Statutory exemptions from operation of usury laws. 36 C. C. A. 343.
What law governs usury. 51 C. C. A. 319.

CANCELLATION.
Of patent to public land. 22 C. C. A. 38.
Of certificates of corporate stock. 55 C. C. A. 167.
Cancellation, surrender, or rescission of charter of vessel. 61 C. C. A. 569.

CARRIERS.
Duty to protect passengers from dangerous fellow passengers. 4 C. C. A. 231.
Right to restrain or expel disorderly passenger. 4 C. C. A. 231.
Duties and liabilities of sleeping-car companies. 10 C. C. A. 335; 34 C. C. A. 386.
Liability for injuries caused by negligence or torts of servants. 10 C. C. A. 466; 27 C. C. A. 651.
Duty to stop trains at station. 14 C. C. A. 362.
Quick dispatch—Demurrage. 14 C. C. A. 657; 21 C. C. A. 342.
Contracts other than for carriage. 20 C. C. A. 521.
Who are common carriers of goods. 20 C. C. A. 521.
Liability as warehousemen. 20 C. C. A. 529.
Duty to trespasser on train. 31 C. C. A. 76.
Liabilities to employés of others carried under contract with carrier. 31 C. C. A. 164.
Persons assisting passengers. 31 C. C. A. 164.
Rights of licensee on train. 31 C. C. A. 164.

CARRIERS—Cont'd.
Rights of person traveling on pass. 31 C. C. A. 164; 32 C. C. A. 306.
Burden of proof of negligence where passengers have been injured. 32 C. C. A. 23.
Live stock—Evidence admissible in actions for injuries through negligence or accident. 32 C. C. A. 148.
Limitations of liability for personal injuries to passengers and for baggage. 32 C. C. A. 301.
Continuance of passenger relation. 40 C. C. A. 437.
Liability of railroads or street car companies for ejection of trespassers. 51 C. C. A. 578.
Injuries to railroad passengers while occupying positions other than regular seats. 54 C. C. A. 4.
Use of carriers' premises by hack and cab drivers, hotel runners, etc. 57 C. C. A. 367.
Regulations of charges by carrier for long and short hauls. 60 C. C. A. 542.
Duties and liabilities of carriers as to furnishing facilities for transportation. 61 C. C. A. 414.
Negligence in ejection of persons under disability. 62 C. C. A. 422.
Liabilities of connecting carriers for injuries to passengers. 64 C. C. A. 485.
Relation of carrier to persons carried under contract with their employers. 67 C. C. A. 427.

CERTIFICATES.
Of receivers. 26 C. C. A. 350.
Of corporate stock—Cancellation. 55 C. C. A. 167.

CERTIORARI.
From supreme court. 1 C. C. A. 5.

CHARITIES.
Liabilities of charitable institutions for negligence. 47 C. C. A. 134.

CHARTER.
Implied warranty of seaworthiness. 15 C. C. A. 388; 60 C. C. A. 179.
Cancellation, surrender, or rescission of charter of vessel. 61 C. C. A. 569.

CHATTEL MORTGAGES.
Controlling effect of state decisions in United States courts. 11 C. C. A. 88.

CHILD.
Death of parent by wrongful act—Damages. 1 C. C. A. 34.
Imputed negligence. 34 C. C. A. 4.
Age as affecting contributory negligence. 37 C. C. A. 362.

CHINESE.
Citizenship. 1 C. C. A. 212; 35 C. C. A. 332.

CIRCUIT COURTS.
Review of jurisdiction of circuit courts. 48 C. C. A. 351.

Digitized by Google

CIRCUIT COURTS—Cont'd.
Jurisdiction of, as determined by the amount in controversy. 19 C. C. A. 75; 36 C. C. A. 459.

CIRCUIT COURTS OF APPEALS.
Certiorari from supreme court. 1 C. C. A. 5.
Jurisdiction. 1 C. C. A. 6; 32 C. C. A. 475.
Effect of previous decisions as to validity of patents. 3 C. C. A. 565; 27 C. C. A. 427; 32 C. C. A. 484.
Review of interlocutory decrees in patent cases. 3 C. C. A. 572; 27 C. C. A. 189; 32 C. C. A. 484.
Orders, decrees, and judgments reviewable. 13 C. C. A. 374.
Enjoining proceedings in state courts. 16 C. C. A. 90; 27 C. C. A. 575; 63 C. C. A. 437.
Conflicts of jurisdiction between federal and state courts. 22 C. C. A. 356; 26 C. C. A. 49.
Jurisdiction on habeas corpus. 25 C. C. A. 11.
Review of jurisdiction of circuit courts. 48 C. C. A. 351.

CITIZENSHIP.
Of Chinese. 1 C. C. A. 212; 35 C. C. A. 332.
Of aliens under state and federal laws. 6 C. C. A. 37.
Of corporations. 6 C. C. A. 174; 10 C. C. A. 249; 27 C. C. A. 301.
Diverse citizenship as a ground of federal jurisdiction. 10 C. C. A. 249; 27 C. C. A. 298.
Of married women. 65 C. C. A. 5.

COLLISION.
As a peril of the sea. 19 C. C. A. 468.
Collision rules—Speed of steamers in fog. 28 C. C. A. 532.
Collision rules—Speed of sailing vessels in fog. 29 C. C. A. 368.
Signals of meeting vessels. 30 C. C. A. 630.
Overtaking vessels. 60 C. C. A. 254.

COLOR OF TITLE.
Tax deed as color of title. 24 C. C. A. 402.

COMMERCE.
Taxation of interstate commerce by state. 8 C. C. A. 492.
Jurisdiction of federal courts of suits under interstate commerce act. 11 C. C. A. 318.
State laws interfering with interstate or foreign commerce—Exclusion, regulation, and taxation of foreign corporations. 24 C. C. A. 13.
Inspection, quarantine, and sanitary regulations interfering with interstate commerce. 59 C. C. A. 191.

CONSPIRACY.
Liabilities of corporations. 39 C. C. A. 17.

CONSPIRACY—Cont'd.
Admissibility, on trial of joint indictments, of acts and declarations of conspirators and codefendants after accomplishment of object. 74 C. C. A. 472.
Judgment against one defendant sued jointly for conspiracy. 80 C. C. A. 245.

CONSTITUTIONAL LAW.
Due process of law in revenue proceedings. 8 C. C. A. 398.
Regulation of commerce by taxation. 8 C. C. A. 492.
Restrictions on grants. 14 C. C. A. 6.
Limitations of taxing power. 23 C. C. A. 515.
Interference with interstate or foreign commerce. 24 C. C. A. 13.
Constitutional limitations of municipal indebtedness. 36 C. C. A. 6.
Trial by jury in criminal prosecutions. 39 C. C. A. 275.
Impairing obligation of contract for exemption from taxation. 70 C. C. A. 294.
Imposition of penalty, extra allowance of damages, costs, or fees as denial of equal protection of law. 72 C. C. A. 547.
Validity of laws alleged to impair charter or franchise of corporation as dependent on reservation of power to alter or amend. 77 C. C. A. 281.

CONTEMPT.
Liability of attorneys. 48 C. C. A. 7.

CONTRACT LABOR.
Importation. 66 C. C. A. 133.

CONTRACTS.
Implied obligation to pay for benefits received. 2 C. C. A. 488.
Jurisdiction of federal courts as to laws impairing obligation of contract. 11 C. C. A. 316.
Relating to use of trade-name. 14 C. C. A. 104.
Mutuality in. 15 C. C. A. 543.
Intent as an element in offer and acceptance. 16 C. C. A. 199.
Admiralty jurisdiction over. 18 C. C. A. 347; 27 C. C. A. 530.
Of common carriers other than for carriage. 20 C. C. A. 521.
Restraining competition in bidding for public works at judicial sales, etc. 28 C. C. A. 192.
For lobby services. 29 C. C. A. 446.
Breach of executory contract—Accrual of right to sue. 30 C. C. A. 210.
Divisibility of contracts. 30 C.C.A. 467.
Of persons non compos mentis under guardianship. 34 C. C. A. 264.
Monopolistic contracts—Validity as affected by public policy. 9 C. C. A. 666; 34 C. C. A. 486.
Marketable title. 40 C. C. A. 592.
Sufficiency of expression of consideration in memorandum within statute of frauds. 46 C. C. A. 183.

Digitized by Google

CONTRACTS—Cont'd.
Persons entitled to enforce specific performance. 47 C. C. A. 493.
Enforcement of contracts requiring performance of continuous acts. 49 C. C. A. 103.
Discharge of surety on building contract by change in obligation or duty of principal. 52 C. C. A. 427.
Marriage by mutual agreement. 52 C. C. A. 581.
Restraining breach of contract of employé not to engage in competing business. 53 C. C. A. 492.
Validity of contracts with public officers as affected by legality of object or consideration. 56 C. C. A. 10.
For sale of things to be produced or manufactured. 58 C. C. A. 363.
Merger of contracts. 60 C. C. A. 6.
Relating to liability of master for negligence causing injury to or death of servant. 62 C. C. A. 5.
Enforcement of contracts of which time is the essence. 63 C. C. A. 562.
Relation of carrier to persons carried under contract with their employers. 67 C. C. A. 427.
Impairing obligation of contract for exemption from taxation. 70 C. C. A. 294.
Practical construction of contracts by parties. 73 C. C. A. 392.
Validity of laws alleged to impair charter or franchise of corporation as dependent on reservation of power to alter or amend. 77 C. C. A. 281.
Rights and liabilities of parties contracting with trusts or combinations in restraint of trade. 78 C. C. A. 612.
Remote or speculative profits as element of damages for breach of contract. 81 C. C. A. 546.

CONTRIBUTION.
On marine loss—General average. 20 C. C. A. 357.

COPYRIGHTS.
Laches as a defense in suits for infringement. 22 C. C. A. 211; 36 C. C. A. 613.
Matter subject to copyright. 58 C. C. A. 273.
Dedication to public or abandonment of copyright. 69 C. C. A. 563.
Infringement by use of extracts and quotations. 76 C. C. A. 475.
Rights of authors to control of publication, disposition or use of their productions independent of statutory copyright. 77 C. C. A. 620.

CORPORATIONS.
Citizenship for purposes of federal jurisdiction. 6 C. C. A. 174; 10 C. C. A. 249; 27 C. C. A. 298.
Status of foreign corporations. 7 C. C. A. 419.
Dissolution of foreign corporation. 7 C. C. A. 421.

CORPORATIONS—Cont'd.
Jurisdiction of federal courts in suits against federal corporations. 11 C. C. A. 314.
Personal liability of directors for negligence. 12 C. C. A. 680; 33 C. C. A. 230.
The power of officers and directors in their individual capacity to deal with corporation. 13 C. C. A. 466.
Use of corporate name as trade-name. 17 C. C. A. 579; 27 C. C. A. 357.
Stockholders' liability to creditors in equity. 23 C. C. A. 315; 33 C. C. A. 23.
Exclusion, regulation, and taxation of foreign corporations. 24 C. C. A. 13.
Power to assign for benefit of creditors. 24 C. C. A. 221.
Foreign corporations "doing business" in state. 33 C. C. A. 585; 72 C. C. A. 622.
Liability for torts. 39 C. C. A. 9.
Rights and liabilities of pledgees of stock. 42 C. C. A. 135.
Service of process on foreign corporations. 45 C. C. A. 3; 78 C. C. A. 473.
Acts of corporators and promoters. 46 C. C. A. 576.
Power to form partnership. 50 C. C. A. 131.
Effect of judgment against corporation in action to enforce stockholder's liability. 52 C. C. A. 305.
Limitation of actions against corporate officers. 53 C. C. A. 7.
Cancellation of certificates of corporate stock. 55 C. C. A. 167.
Liability of transferrors and transferees of corporate stock for assessments. 61 C. C. A. 322.
Liabilities enforceable against reorganized corporations. 62 C. C. A. 147.
Acquisition by corporation of stock of other corporation. 68 C. C. A. 120.
Evidence of membership in corporation. 72 C. C. A. 423.
Liabilities of corporate officers for debts and acts of corporation as dependent on knowledge or participation. 75 C. C. A. 492.
Powers of committees of directors or trustees of corporations. 76 C.C.A. 7.
Validity of laws alleged to impair charter or franchise of corporation as dependent on reservation of power to alter or amend. 77 C. C. A. 281.
Liability of corporation succeeding to partnership for debts of firm. 80 C. C. A. 560.
Rights and liabilities of stockholders of railroads on consolidation. 81 C. C. A. 480.

COSTS.
Right to costs in equity. 17 C. C. A. 368.
Imposition of extra allowance of costs, or fees as denial of equal protection of law. 72 C. C. A. 547.

Digitized by Google

COUNTERFEITING.
Nonmailable matter. 30 C. C. A. 86.

COURTS. See "Federal Courts."
Dicta. 64 C. C. A. 361.

CREDIT.
Loss of as element of damages. 62 C. C. A. 612.

CREDIT INSURANCE. 19 C. C. A. 271; 34 C. C. A. 165.

CRIMINAL LAW. See "Rewards."
Practice on trial before jury. 26 C. C. A. 528.
Trial by jury in criminal prosecutions. 39 C. C. A. 275.
Prosecution and punishment of accessories. 44 C. C. A. 326.
Power of court to revise sentence. 46 C. C. A. 412.
Restraining criminal proceedings. 51 C. C. A. 133.
Proof of corpus delicti to corroborate a confession. 53 C. C. A. 278.
Comments of counsel and instructions on failure of accused to testify. 54 C. C. A. 373.
Preliminaries to introduction of secondary evidence in criminal prosecutions. 61 C. C. A. 117.
Discontinuance, nolle prosequi, or dismissal as bar to subsequent prosecution. 68 C. C. A. 4.
Consolidation of and trial of indictments together. 69 C. C. A. 287.
Review, by trial court, of evidence given before grand jury. 69 C. C. A. 488.
Circumstantial evidence of corpus delicti. 70 C. C. A. 156.
Admission on joint trial, of evidence competent only against one or part of defendants. 73 C. C. A. 295.
Admissibility, on trial of joint indictments, of acts and declarations of conspirators and codefendants after accomplishment of object. 74 C. C. A. 472.
Effect of acquittal in criminal prosecution on liability in tort for alleged criminal act. 79 C. C. A. 407.
Right of accused to be confronted by witnesses. 80 C. C. A. 116.
Computation of cumulative sentences. 81 C. C. A. 196.
Admissibility of written instruments in criminal prosecutions as dependent on preliminary proof. 82 C. C. A. 8.

CUSTOMS AND USAGES.
Presumptions. 56 C. C. A. 394.

CUSTOMS DUTIES.
Interpretation of commercial and trade terms in tariff laws. 18 C. C. A. 545.

DAMAGES.
Mental suffering as an element of damage in general. 11 C. C. A. 556.

DAMAGES—Cont'd.
For mental suffering for delay in delivery of telegram. 11 C. C. A. 571; 15 C. C. A. 250; 28 C. C. A. 62.
Delay in transmission of telegraphic message. 14 C. C. A. 177.
Measure of, in actions against telegraph companies. 15 C. C. A. 235; 28 C. C. A. 59.
In condemnation proceedings. 16 C. C. A. 468.
For personal injuries as affected by plaintiff's character and condition. 27 C. C. A. 138.
Negligence of both master and servant —Division of damages in admiralty. 30 C. C. A. 678.
Liability of corporations for exemplary or punitive damages. 39 C. C. A. 18.
Punitive damages for death by wrongful act. 44 C. C. A. 259.
Reduction or increase of amount of recovery on appeal. 48 C. C. A. 470.
Persons entitled to damages for wrongful enforcement of tax. 54 C. C. A. 550.
Aggravation of disease or injury due to existing disease, predisposition, or physical condition. 54 C. C. A. 645.
Loss of credit as element of damages. 62 C. C. A. 612.
Mitigation of damages for wrongful discharge from employment by failure of servant to seek or accept other employment. 64 C. C. A. 5.
Retraction, apology, or reparation as ground for mitigation of damages for libel and slander. 71 C. C. A. 315.
Imposition of penalty, extra allowance of damages, costs or fees as denial of equal protection of law. 72 C. C. A. 547.
Remote or speculative profits as element of damages for breach of contract. 81 C. C. A. 546.

DEATH BY WRONGFUL ACT.
Mental suffering as element of damages. 11 C. C. A. 563.
Punitive damages. 44 C. C. A. 259.
What law governs actions. 47 C. C. A. 606.

DECREES.
Power of court to amend or modify interlocutory orders and decrees. 61 C. C. A. 236.

DEDICATION.
Of copyright to public. 69 C. C. A. 563.

DEEDS.
Names of parties. 23 C. C. A. 146.
Construction and operation of conveyances of real property and interests therein by executors or administrators. 74 C. C. A. 382.

DEMURRAGE.
Quick dispatch. 14 C. C. A. 657; 21 C. C. A. 342.
Definition and general principles. 21 C. C. A. 337; 46 C. C. A. 4.

Digitized by Google

DEPOSITION.
Conformity to state practice. 5 C. C. A. 602; 27 C. C. A. 392; 71 C. C. A. 110.
Use of deposition when deponent is present. 50 C. C. A. 232.
Irregularities in taking or return of depositions as ground for exclusion as evidence. 73 C. C. A. 608.

DICTA.
Of courts. 64 C. C. A. 361.

DIRECTORS.
Personal liability for negligence. 12 C. C. A. 680; 33 C. C. A. 230.

DISCOVERY.
Conformity to state practice. 5 C. C. A. 594; 27 C. C. A. 393.
Persons against whom production and inspection of books or writings may be obtained. 81 C. C. A. 96.

DISMISSAL AND NONSUIT.
Discontinuance, nolle prosequi, or dismissal as bar to subsequent prosecution. 68 C. C. A. 4.

DISSOLUTION.
Of foreign corporations. 7 C. C. A. 421.
Of municipal corporations—Effect on indebtedness. 33 C. C. A. 506.

DIVORCE.
Separation agreements. 38 C. C. A. 608.

DOMICILE.
Effect of change of domicile on the question of diverse citizenship. 10 C. C. A. 251.

DOWER.
How inchoate right extinguished. 3 C. C. A. 316.
In mines. 3 C. C. A. 316.
What estate subject to dower. 3 C. C. A. 316.
Divestiture of inchoate right by legislative action. 4 C. C. A. 295.

ELECTION OF REMEDIES.
Against undisclosed principal or agent. 77 C. C. A. 166.

EMINENT DOMAIN.
Consequential and indirect damages. 16 C. C. A. 468.
Nature of estate or interest acquired in condemnation proceedings. 53 C. C. A. 604.
Nature and extent of power of United States to condemn property for public use. 70 C. C. A. 653.
Proceedings under power of eminent domain as civil suits under laws relating to removal of causes to federal courts. 73 C. C. A. 183.

EQUITY.
Right to costs. 17 C. C. A. 368.
Equitable mortgages. 18 C. C. A. 458.
Stockholders' liability to creditors of corporation. 23 C. C. A. 315; 33 C. C. A. 23.

EQUITY—Cont'd.
Compensation of masters in chancery. 27 C. C. A. 475.
Conclusiveness and effect of judgments as between courts of law and equity. 50 C. C. A. 463.
Obtaining possession or establishing title to personal property in equity. 58 C. C. A. 101.
Operation and effect of decision in equitable suit for infringement of patent. 68 C. C. A. 541.
He, who comes into equity, must come with clean hands. 70 C. C. A. 543.

ESTOPPEL.
As against state or United States. 16 C. C. A. 353.

EVIDENCE.
New proofs on appeal in admiralty. 3 C. C. A. 322.
Rules of evidence in federal courts—Following state practice. 5 C. C. A. 594.
Examination of party before trial—Conformity to state practice. 5 C. C. A. 602.
Excluded from bill of exceptions. 14 C. C. A. 248.
Burden of proof of negligence where passenger has been injured. 32 C. C. A. 23.
Evidence admissible to show injury to live stock, during transportation, through negligence or accident. 32 C. C. A. 148.
Judicial notice of public laws and regulations. 44 C. C. A. 4.
Use of deposition when deponent is present. 50 C. C. A. 232.
Negative testimony. 52 C. C. A. 82.
As to character or reputation in civil actions. 55 C. C. A. 7.
Presumptions as to customs and usages. 56 C. C. A. 394.
Utility, extent of use, and commercial success as evidence of invention. 59 C. C. A. 620.
Preliminaries to introduction of secondary evidence in criminal prosecutions. 61 C. C. A. 117.
Additional proofs in appellate court without trial de novo. 67 C. C. A. 600.
Presumptions and burden of proof as to cause of loss or injury to goods shipped by vessel, and diligence or negligence of carrier. 68 C. C. A. 398.
Review, by trial court, of evidence given before grand jury. 69 C. C. A. 488.
Circumstantial evidence of corpus delicti. 70 C. C. A. 156.
Procedure of federal courts and adoption of state practice as to taking proof. 71 C. C. A. 110.
Evidence of membership in corporation. 72 C. C. A. 423.
Admission on joint trial, of evidence competent only against one or part of defendants. 73 C. C. A. 295.

Digitized by Google

EVIDENCE—Cont'd.
Irregularities in taking or return of depositions as ground for exclusion as evidence. 73 C. C. A. 608.
Expert testimony as to value of services. 74 C. C. A. 257.
Admissibility, on trial of joint indictments, of acts and declarations of conspirators and codefendants after accomplishment of object. 74 C. C. A. 472.
Inferences from evidence as dependent on sufficiency and degree of proof. 74 C. C. A. 561.
Evidence of emancipation of child. 75 C. C. A. 393.
Photographs as evidence in civil actions. 78 C. C. A. 145.
Weight and sufficiency of evidence of willful burning by insured as a defence to action on policy. 79 C. C. A. 455.
Persons against whom production and inspection of books or writings may be obtained. 81 C. C. A. 96.
Admissibility of written instruments in criminal prosecutions as dependent on preliminary proof. 82 C. C. A. 8.
Application of doctrine of res ipsa loquitur in actions for injuries to servants. 82 C. C. A. 121.

EXCEPTIONS, BILL OF.
Time of filing—When regulated by state practice. 5 C. C. A. 594.
Exclusion of evidence from. 14 C. C. A. 248.

EXCHANGES.
Membership in stock exchange as an asset in bankruptcy. 43 C. C. A. 389.
Quotations of prices and transactions on exchanges. 61 C. C. A. 2.

EXECUTIVE DEPARTMENTS.
Regulations of. 26 C. C. A. 239.

EXECUTORS AND ADMINISTRATORS.
Citizenship as affecting the jurisdiction of the federal courts. 10 C. C. A. 252.
Probate jurisdiction of federal courts. 36 C. C. A. 276.
Construction and operation of conveyances of real property and interests therein by executor or administrator. 74 C. C. A. 382.

EXTINGUISHMENT.
Of maritime liens. 17 C. C. A. 102.

EXTRADITION.
Scope of review on habeas corpus to procure release of person sought to be extradited. 62 C. C. A. 506.
Fugitives from justice under extradition laws. 63 C. C. A. 104.

FEDERAL COURTS.
Jurisdiction of circuit courts of appeals in general. 1 C. C. A. 6; 32 C. C. A. 475.

FEDERAL COURTS—Cont'd.
Jurisdiction as affected by state laws. 1 C. C. A. 513.
Jurisdiction of circuit court of appeals to review interlocutory decrees in patent cases. 3 C. C. A. 572; 27 C. C. A. 189; 32 C. C. A. 484.
Conformity of practice in common-law actions to that of state court. 5 C. C. A. 594; 27 C. C. A. 392.
Jurisdiction over corporations. 6 C. C. A. 174.
State laws as rules of decision in federal courts. 11 C. C. A. 71; 29 C. C. A. 553.
Diverse citizenship as a ground of federal jurisdiction. 10 C. C. A. 249; 27 C. C. A. 298.
Jurisdiction in cases involving federal question. 11 C. C. A. 308; 35 C. C. A. 7.
Jurisdiction and judgments of Indian courts. 11 C. C. A. 468.
Federal jurisdiction of suits against state. 13 C. C. A. 165.
Orders, decrees, and judgments reviewable in circuit court of appeals. 13 C. C. A. 374.
Jurisdiction as affected by possession of the subject-matter. 15 C. C. A. 6.
Enjoining proceedings in state courts. 16 C. C. A. 90; 27 C. C. A. 575; 63 C. C. A. 437.
Lack of jurisdiction of United States circuit court. 16 C. C. A. 507.
Removal of causes—Separable controversy. 18 C. C. A. 86; 35 C. C. A. 155.
Jurisdiction in admiralty as to matters of contract. 18 C. C. A. 347; 27 C. C. A. 530.
Jurisdiction of circuit courts as determined by the amount in controversy. 19 C. C. A. 75; 36 C. C. A. 459.
Jurisdiction in admiralty to enforce liens created by state laws. 21 C. C. A. 21.
Conclusiveness of judgment between federal and state courts. 21 C. C. A. 478; 49 C. C. A. 468.
Conflict of jurisdiction with state courts. 22 C. C. A. 356.
Jurisdiction in mortgage foreclosure. 24 C. C. A. 523.
Jurisdiction on habeas corpus. 25 C. C. A. 4.
Mandamus to enforce payment of judgment against municipality. 25 C. C. A. 475.
Suits by and against receivers of. 26 C. C. A. 49.
Jury trial—Province of court and jury. 26 C. C. A. 528.
Supplementary and ancillary proceedings and relief. 36 C. C. A. 195.
Probate jurisdiction. 36 C. C. A. 276.
Admiralty jurisdiction of suits between foreigners. 37 C. C. A. 193.
Enjoining proceedings in federal courts. 45 C. C. A. 591.

Digitized by Google

FEDERAL COURTS—Cont'd.
Pendency of action in state or federal court as ground for abatement of action in the other. 47 C. C. A. 205; 73 C. C. A. 521.
Review of jurisdiction of circuit courts. 48 C. C. A. 351.
Waiver of right as to district in which suit may be brought. 52 C. C. A. 192.
Procedure of federal courts and adoption of state practice as to taking proof. 71 C. C. A. 110.
Legal and equitable remedies and proceedings on removal from state court. 75 C. C. A. 4.
Fraudulent joinder of parties to prevent removal of cause to federal court. 78 C. C. A. 362.
Jurisdiction of federal courts to enforce or remove liens or incumbrances on property of parties not inhabitants of nor found in district of suit. 80 C. C. A. 7.

FEDERAL QUESTIONS.
As conferring jurisdiction on United States courts. 11 C. C. A. 308; 35 C. C. A. 7.

FEES.
Imposition of extra allowance of costs, or fees as denial of equal protection of law. 72 C. C. A. 547.

FELLOW SERVANTS.
Who are. 8 C. C. A. 668; 31 C. C. A. 286.
Concurrent negligence of master and fellow servant. 40 C. C. A. 236.

FERRIES.
As carriers. 20 C. C. A. 536.

FIDELITY INSURANCE. 19 C. C. A. 273.

FIRES.
As a peril of the sea. 19 C. C. A. 472.
Presumption of negligence from railroad fires. 41 C. C. A. 370.
Fire escapes on buildings. 64 C. C. A. 217.
What constitutes loss by fire under insurance policy. 72 C. C. A. 3.

FORECLOSURE.
In federal courts. 24 C. C. A. 523.
Distribution of proceeds. 29 C. C. A. 639.

FOREIGN CORPORATIONS.
Status under the rule of comity. 7 C. C. A. 419.
Dissolution. 7 C. C. A. 421.
Exclusion—Regulation and taxation. 24 C. C. A. 13.
What constitutes "doing business" in state. 33 C. C. A. 585; 72 C. C. A. 622.
Service of process. 45 C. C. A. 3; 78 C. C. A. 473.

FORMER JEOPARDY.
Discontinuance, nolle prosequi, or dismissal as bar to subsequent prosecution. 68 C. C. A. 4.

FRANCHISES.
As assets in bankruptcy. 43 C. C. A. 389.

FRAUD.
In use of trade-marks and trade-names. 17 C. C. A. 579, 657; 20 C. C. A. 165; 30 C. C. A. 380.
Nonmailable matter. 30 C. C. A. 86.
Liabilities of corporations. 39 C. C. A. 16.

FRAUDS, STATUTE OF.
Sufficiency of expression of consideration in memorandum within statute. 46 C. C. A. 183.

GARNISHMENT.
Following state practice. 5 C. C. A. 606; 27 C. C. A. 393.
Of receivers. 26 C. C. A. 49.
Nature of rights acquired by garnishment proceedings. 76 C. C. A. 270.

GENERAL AVERAGE.
Marine insurance. 20 C. C. A. 357.

GIFTS.
Revocation of gifts causa mortis. 54 C. C. A. 143.

GRAND JURY.
Review by trial court, of evidence given before grand jury. 69 C. C. A. 488.

GUARANTY.
Discharge of guarantor by discharge of principal without payment or satisfaction. 78 C. C. A. 266.

GUARANTY INSURANCE. 19 C. C. A. 271.

GUARDIAN AND WARD.
Citizenship as affecting the jurisdiction of the federal courts. 10 C. C. A. 253; 27 C. C. A. 300.

HABEAS CORPUS.
Jurisdiction of federal courts. 25 C. C. A. 4.
Scope of review on habeas corpus to procure release of persons sought to be extradited. 62 C. C. A. 506.

HEALTH.
Inspection, quarantine, and sanitary regulations interfering with interstate commerce. 59 C. C. A. 191.

HOMESTEAD.
Rights acquired by homestead settlements and entries on public lands. 59 C. C. A. 434.

HOSPITALS.
Liability for negligence. 47 C. C. A. 134.

Digitized by Google

HUSBAND AND WIFE.
Liability of husband for negligence and torts of wife. 12 C. C. A. 196.
Paraphernal property. 31 C. C. A. 40.
Separation agreements. 38 C. C. A. 608.
Citizenship of married women. 65 C. C. A. 5.
Rights of action between. 79 C. C. A. 306.

IMPLICATION.
Repeal of statutes by implication. 38 C. C. A. 136.

IMPROVEMENTS.
Rights of co-tenant as to improvements made under mistaken belief of perfect title. 69 C. C. A. 19.

INDEBTEDNESS.
Constitutional and statutory limitations of municipal indebtedness. 36 C. C. A. 6.

INDEPENDENT CONTRACTORS.
Negligence of employés. 28 C. C. A. 392.

INDIANS.
Jurisdiction and judgments of Indian courts. 11 C. C. A. 468.
Citizenship of. 27 C. C. A. 298.

INDICTMENT AND INFORMATION.
Consolidation of and trial of indictments together. 69 C. C. A. 287.

INFANTS.
Imputed negligence. 34 C. C. A. 4.
Age as affecting contributory negligence. 37 C. C. A. 362.
Implied emancipation of child. 71 C. C. A. 629.
Evidence of emancipation of child. 75 C. C. A. 393.

INJUNCTION.
Restraining proceedings in state courts. 16 C. C. A. 90; 27 C. C. A. 575; 63 C. C. A. 437.
Jurisdiction of circuit court of appeals to review interlocutory decrees. 32 C. C. A. 481.
Restraining pollution of water courses. 37 C. C. A. 544.
Right of taxpayer to enjoin misuse of public funds and property. 38 C. C. A. 458.
Restraining proceedings in federal courts. 45 C. C. A. 591.
Restraining criminal proceedings. 51 C. C. A. 133.
Restraining breach of contract of employé not to engage in competing business. 53 C. C. A. 492.
Persons entitled to restrain wrongful enforcement of tax. 54 C. C. A. 550.
Restraining enforcement of judgment pending establishment or enforcement of set-off or counterclaim. 58 C. C. A. 532.

INJUNCTION—Cont'd.
Grounds for denial of preliminary injunctions in patent infringement suits. 72 C. C. A. 123.

INJURIOUS NOTICES.
Nonmailable matter. 30 C. C. A. 93.

INNKEEPERS.
Fire escapes on buildings. 64 C. C. A. 217.
Liabilities for personal injuries to guests. 66 C. C. A. 483.

INSANE PERSONS.
Contracts of persons non compos mentis under guardianship. 33 C. C. A. 264.
Effect of insanity on the question of suicide in insurance suits. 16 C. C. A. 623; 28 C. C. A. 284.

INSOLVENCY.
Effect of national bankruptcy act on state insolvency laws and on assignments for benefit of creditors. 51 C. C. A. 11.
Right to proceeds of collection on insolvency of collecting bank. 69 C. C. A. 333.

INSPECTION.
Of public records. 49 C. C. A. 210.
Inspection, quarantine, and sanitary regulations interfering with interstate commerce. 59 C. C. A. 191.
Duty of servant to inspect appliances and places for work. 65 C. C. A. 370.

INSURANCE.
Accident insurance—Risks and causes of loss. 38 C. C. A. 3.
Conditions in policy as to time for bringing suit. 2 C. C. A. 473; 35 C. C. A. 404.
Conditions of policy—Arbitration. 9 C. C. A. 628; 39 C. C. A. 389.
Authority of insurance agent to waive prepayment of premiums. 13 C. C. A. 292.
Suicide as a defense to a life policy. 16 C. C. A. 623; 28 C. C. A. 284.
Credit insurance. 19 C. C. A. 271; 34 C. C. A. 165.
Guaranty insurance. 19 C. C. A. 271.
Fidelity insurance. 19 C. C. A. 273.
Title insurance. 19 C. C. A. 278.
Marine insurance—Perils of the sea. 19 C. C. A. 465.
Marine insurance—General average. 20 C. C. A. 357.
Waiver of condition against other insurance. 27 C. C. A. 46.
Divisibility of contracts. 30 C. C. A. 474.
Waiver by acceptance of premiums. 33 C. C. A. 369.
What constitutes an insurable interest in human life. 39 C. C. A. 632.
Change of beneficiary. 40 C. C. A. 4.
Commencement of risk. 41 C. C. A. 273.

Digitized by Google

INSURANCE—Cont'd.
What law governs policies. 46 C. C. A. 287.
Authority of insurance agents as to acceptance of risks. 49 C. C. A. 335.
Liability for injuries sustained by assured while engaged in occupation not covered by policy. 51 C. C. A. 434.
Time for notice of loss. 55 C. C. A. 376.
Notice of premiums, dues, and assessments. 59 C. C. A. 317.
Mutual benefit insurance contracts as affected by subsequent provisions and amendments of charter, constitution, or by-laws. 63 C. C. A. 285.
Subrogation of insurer under assignment of rights of insured. 65 C. C. A. 615.
What constitutes loss by fire under insurance policy. 72 C. C. A. 3.
Weight and sufficiency of evidence of willful burning by insured as a defense to action on policy. 79 C. C. A. 455.
Accounting for profits, dividends or surplus of mutual insurance company at instance of policy holders or stockholders. 81 C. C. A. 4.

INTENT.
As an element in offer and acceptance of proposition. 16 C. C. A. 199.

INTERNATIONAL LAW.
Effect of acquisition of territory by United States on laws and property rights therein. 80 C. C. A. 457.

INTERSTATE COMMERCE.
Taxation of by state. 8 C. C. A. 492.
Jurisdiction of federal courts of suits under interstate commerce act. 11 C. C. A. 318.
State laws interfering with interstate commerce. 24 C. C. A. 21.
Inspection, quarantine, and sanitary regulations interfering with interstate commerce. 59 C. C. A. 191.

JUDGMENT.
Method of entering judgment in federal court—Following state practice. 5 C. C. A. 604.
Of federal courts—Jurisdiction as involving federal question. 11 C. C. A. 317.
Giving full faith and credit—Jurisdiction of federal courts. 11 C. C. A. 318.
Rendition on Sunday. 12 C. C. A. 462.
Finality of judgments for purposes of review. 2 C. C. A. 379; 17 C. C. A. 238; 28 C. C. A. 482.
Conclusiveness as between federal and state courts. 21 C. C. A. 478; 49 C. C. A. 468.
Enforcement against municipality by mandamus. 25 C. C. A. 475.

JUDGMENT—Cont'd.
Conclusiveness and effect of judgments as between courts of law and equity. 50 C. C. A. 463.
Effect of judgment against corporation in action to enforce stockholder's liability. 52 C. C. A. 305.
Restraining enforcement of judgment pending establishment or enforcement of set-off or counterclaim. 58 C. C. A. 532.
Power of court to amend or modify interlocutory orders and decrees. 61 C. C. A. 236.
Authority of attorney after judgment. 67 C. C. A. 130.
Satisfaction of one or more judgments for same cause of action. 67 C. C. A. 322.
Operation and effect of decision in equitable suit for infringement of patent. 68 C. C. A. 541.
Judgment against one defendant sued jointly for conspiracy. 80 C. C. A. 245.
Deficiency judgments and personal liability on foreclosure of vendors' liens. 82 C. C. A. 488.

JUDICIAL SALES.
On Sunday. 12 C. C. A. 462.
Contracts restraining competition in bidding. 28 C. C. A. 192.

JURISDICTION.
Of federal courts. See "Federal Courts."
Of circuit court of appeals. 1 C. C. A. 6; 32 C. C. A. 475.
Of supreme court. 1 C. C. A. 9, 11.
Diverse citizenship as ground of federal jurisdiction. 10 C. C. A. 249; 27 C. C. A. 298.
Federal question as ground of jurisdiction. 11 C. C. A. 308; 35 C. C. A. 7.
Of Indian courts. 11 C. C. A. 468.
As affected by possession of the subject-matter. 15 C. C. A. 6.
Removal of causes—Separable controversy. 18 C. C. A. 86; 35 C. C. A. 155.
Of circuit courts as determined by the amount in controversy. 19 C. C. A. 75; 36 C. C. A. 459.
Conflict between federal and state courts. 22 C. C. A. 356.
Probate jurisdiction. 36 C. C. A. 276.
Admiralty jurisdiction of suits between foreigners. 37 C. C. A. 193.
Review of jurisdiction of circuit courts. 48 C. C. A. 351.

JURY.
Right to trial by jury in federal court. 5 C. C. A. 603; 26 C. C. A. 528.
Following state practice. 5 C. C. A. 603; 27 C. C. A. 393.
Instructing jury and receiving verdict on Sunday. 12 C. C. A. 462.
Trial by jury in criminal prosecutions. 39 C. C. A. 275.

Digitized by Google

LACHES.
As a defense in suits for infringement of patents, copyrights, and trademarks. 22 C. C. A. 211; 36 C. C. A. 613.

LAND DEPARTMENT.
Conclusiveness and effect of decisions. 22 C. C. A. 38; 28 C. C. A. 344; 57 C. C. A. 207.

LANDLORD AND TENANT.
Holding over by tenant after expiration of term as affecting liability for rent. 71 C. C. A. 513.

LIBEL AND SLANDER.
Evidence of other offenses and publications in mitigation of damages. 40 C. C. A. 168.
Liabilities of corporations. 39 C. C. A. 15.
Retraction, apology, or reparation as ground for mitigation of damages. 71 C. C. A. 315.

LICENSE.
Implied rights of licensee of a patent. 25 C. C. A. 280.
Rights of licensee on train. 31 C. C. A. 164.
Licenses as assets in bankruptcy. 43 C. C. A. 389.
Sublicenses and assignments of licenses for use or sale of patents. 64 C. C. A. 596.

LIENS.
Maritime liens. 15 C. C. A. 679; 17 C. C. A. 102; 21 C. C. A. 21.
Attorneys' liens. 32 C. C. A. 229.
Maritime liens for torts. 34 C. C. A. 565.
Who are entitled to liens or preferences as laborers or employés. 47 C. C. A. 2.
Lien of banks on stock. 56 C. C. A. 179.
Continuance or revival of mechanics' liens. 71 C. C. A. 17.
Persons entitled to liens against railroads for labor and supplies. 75 C. C. A. 274.
Jurisdiction of federal courts to enforce or remove liens or incumbrances on property of parties not inhabitants of nor found in district of suit. 80 C. C. A. 7.

LIFE INSURANCE.
Suicide as a defense. 16 C. C. A. 623; 28 C. C. A. 284.
Waiver by acceptance of premiums. 33 C. C. A. 369.

LIMITATION OF ACTIONS.
Against corporate officers. 53 C. C. A. 7.
Bar of action as determined by limitations of state other than that in which action is brought. 58 C. C. A. 186.

LITERARY PROPERTY.
Rights of authors to control of publication, disposition or use of their productions independent of statutory copyright. 77 C. C. A. 620.

LOTTERY.
What constitutes. 12 C. C. A. 346.
Nonmailable matter. 30 C. C. A. 90.

MAIL.
Nonmailable matter. 30 C. C. A. 79.

MALICIOUS PROSECUTION.
Liabilities of corporations. 39 C. C. A. 14.

MANDAMUS.
In aid of appeals. 10 C. C. A. 450.
To enforce payment of judgment against municipality. 25 C. C. A. 475.
Appeal or mandamus. 47 C. C. A. 376.
Enforcement of decree of appellate court by mandamus. 77 C. C. A. 409.

MANUFACTURES.
Liabilities of manufacturers of injurious substances or defective machinery and appliances for injuries to persons other than immediate vendees. 57 C. C. A. 5.
Contracts for sale of things to be manufactured. 58 C. C. A. 363.
Fire escapes on factories. 64 C. C. A. 217.

MARINE INSURANCE.
Perils of the sea. 19 C. C. A. 463.
General average. 20 C. C. A. 357.

MARITIME LIENS.
For supplies and services—Presumption as to credit to vessel. 15 C. C. A. 679.
Waiver and extinguishment. 17 C. C. A. 102.
Created by state laws. 21 C. C. A. 21.
For torts. 34 C. C. A. 565.

MARRIAGE.
Effect of existing marriage on subsequent marriage or contract to marry. 50 C. C. A. 583.
Marriage by mutual agreement. 52 C. C. A. 581.

MASTER AND SERVANT.
Who are fellow servants. 8 C. C. A. 668; 31 C. C. A. 286.
Liabilities of carriers for injuries caused by negligence or torts of servants. 10 C. C. A. 466; 27 C. C. A. 651.
Who are independent contractors. 28 C. C. A. 392.
Divisibility of contracts for services. 30 C. C. A. 467.
Negligence of both—Division of damages in admiralty. 30 C. C. A. 678.
Duty of railroad companies to furnish safe appliances. 37 C. C. A. 8.

Digitized by Google

MASTER AND SERVANT—Cont'd.
Assumption of risk incident to employment. 38 C. C. A. 314.
Concurrent negligence of master and fellow servant. 40 C. C. A. 236.
Injuries to servant while not on duty. 44 C. C. A. 489.
Duty of railroad companies to block switches. 46 C. C. A. 98.
Who are entitled to liens or preferences as laborers or employés. 47 C. C. A. 2.
What law governs master's liability for injuries to servant. 48 C. C. A. 232.
Liability for injuries to volunteers. 51 C. C. A. 509.
Restraining breach of contract of employé not to engage in competing business. 53 C. C. A. 492.
Contracts relating to liability of master for negligence causing injury to or death of servant. 62 C. C. A. 5.
Mitigation of damages for wrongful discharge from employment by failure of servant to seek or accept other employment. 64 C. C. A. 5.
Fire escapes on buildings. 64 C. C. A. 217.
Duty of servant to inspect appliances and places for work. 65 C. C. A. 370.
Importation of contract labor. 66 C. C. A. 133.
Relation of carrier to persons carried under contract with their employers. 67 C. C. A. 427.
Right to invention as between employer and employé. 71 C. C. A. 221.
Expert testimony as to value of services. 74 C. C. A. 257.
Application of doctrine of res ipsa loquitur in actions for injuries to servants. 82 C. C. A. 121.

MASTERS IN CHANCERY.
Compensation. 27 C. C. A. 475.

MECHANICS' LIENS.
Continuance or revival of mechanics' liens. 71 C. C. A. 17.
Persons entitled to liens against railroads for labor and supplies. 75 C. C. A. 274.

MENTAL SUFFERING.
As an element of damages. 11 C. C. A. 556.
Damages for, by delay in delivering telegram. 11 C. C. A. 571; 15 C. C. A. 250; 28 C. C. A. 62.

MINES AND MINING.
Right of dower in mines. 3 C. C. A. 316.
Mining partnerships. 35 C. C. A. 515.
Conclusiveness of patents for mining claims. 28 C. C. A. 346; 48 C. C. A. 674.
Rights under mining location to veins having apexes within claim. 66 C. C. A. 311.

MINES AND MINING—Cont'd.
Sufficiency of discovery of mineral characteristics to support mining location. 79 C. C. A. 6.
Partition of mineral rights or lands. 81 C. C. A. 405.

MOBS.
Municipal liability for acts of mobs. 57 C. C. A. 517.

MONOPOLIES.
Constitutional restrictions on grant. 14 C. C. A. 6.
Monopolistic contracts—Validity as affected by public policy. 34 C. C. A. 486.
Rights and liabilities of parties contracting with trusts or combinations in restraint of trade. 78 C. C. A. 612.

MORTGAGES.
Equitable mortgages—Agreement to give a mortgage. 18 C. C. A. 458.
Names of parties in deeds and mortgages. 23 C. C. A. 146.
Foreclosure in federal courts. 24 C. C. A. 523.
Distribution of proceeds on foreclosure. 29 C. C. A. 639.
Taxation of. 31 C. C. A. 467.
Subrogation to rights of mortgagee. 42 C. C. A. 304.

MUNICIPAL CORPORATIONS.
Liability for torts of public officers. 14 C. C. A. 534.
Enforcement of judgment against municipality by mandamus. 25 C. C. A. 475.
Dissolution and reincorporation—Effect on indebtedness. 33 C. C. A. 506.
Constitutional and statutory limitations of municipal indebtedness. 36 C. C. A. 6.
Right of taxpayer to enjoin misuse of public funds and property. 38 C. C. A. 458.
Bona fide purchasers of municipal bonds. 41 C. C. A. 6.
Rights of telegraph and telephone companies to use of streets. 44 C. C. A. 155.
Municipal liability for acts of mobs. 57 C. C. A. 517.
Effect of violation of ordinances limiting speed of trains. 59 C. C. A. 5.
Rights and remedies of holders of invalid municipal securities. 66 C. C. A. 235.
Relative rights of street railroads, and vehicles and pedestrians in use and occupation of streets. 73 C. C. A. 12.

NAMES.
Of parties in deeds and mortgages. 23 C. C. A. 146.
Use of person's name as trade-name. 17 C. C. A. 579; 27 C. C. A. 357.

NAVIGABLE WATERS.
Obstruction—Jurisdiction of federal courts. 11 C. C. A. 318.

Digitized by Google

NEGLIGENCE.
Liabilities of carriers for negligence of servants. 10 C. C. A. 466; 27 C. C. A. 651.
Of wife—Liability of husband. 12 C. C. A. 196.
Personal liability of directors. 12 C. C. A. 680; 33 C. C. A. 230.
In transmission of telegram. 14 C. C. A. 177.
Of independent contractor. 28 C. C. A. 392.
Duty of railroads to give warning signals at crossing. 29 C. C. A. 90.
Of both master and servant—Division of damages in admiralty. 30 C. C. A. 678.
Injuries to trespasser on train. 31 C. C. A. 76.
Injuries to one traveling on pass. 31 C. C. A. 164.
Injuries to licensee on train. 31 C. C. A. 164.
Injuries to servant. 31 C. C. A. 286.
Burden of proof where passengers have been injured. 32 C. C. A. 23.
Evidence admissible to show injury to live stock through negligence or accident during transportation. 32 C. C. A. 148.
Imputed to infant. 34 C. C. A. 4.
Sleeping-car companies. 34 C. C. A. 386.
Duty of railroad companies to furnish safe appliances. 37 C. C. A. 8.
Age as affecting contributory negligence. 37 C. C. A. 362.
Liabilities of corporations. 39 C. C. A. 15.
Concurrent negligence of master and fellow servant. 40 C. C. A. 236.
Care required of motormen. 40 C. C. A. 361.
Presumption from railroad fires. 41 C. C. A. 370.
Injuries to servant not on duty. 44 C. C. A. 489.
Duty of railroad companies to block switches. 46 C. C. A. 98.
Liabilities of charitable institutions for negligence. 47 C. C. A. 134.
What law governs master's liability for injuries to servant. 48 C. C. A. 232.
Liability of employer for injuries to volunteers. 51 C. C. A. 509.
Injuries to railroad passengers while occupying positions other than regular seats. 54 C. C. A. 4.
Injuries to persons at public entertainment or exhibition. 56 C. C. A. 502.
Liabilities of manufacturers and venders of injurious substances or defective machinery and appliances for injuries to persons other than immediate vendees. 57 C. C. A. 5.
In ejection of passengers or trespassers under disability. 62 C. C. A. 422.
Liabilities of connecting carriers for injuries to passengers. 64 C. C. A. 485.
Fire escapes on buildings. 64 C. C. A. 217.

NEGLIGENCE—Cont'd.
Liabilities of innkeepers for personal injuries to guests. 66 C. C. A. 483.
Presumptions and burden of proof as to cause of loss or injury to goods shipped by vessel and diligence or negligence of carrier. 68 C. C. A. 398.

NEUTRALITY LAWS.
Object and scope of neutrality law. 28 C. C. A. 622.

NEW TRIAL.
Following state practice. 5 C. C. A. 605; 27 C. C. A. 393.
Jurisdiction of lower court to rehear cause or grant new trial after remand by appellate court. 70 C. C. A. 416.

NOLLE PROSEQUI.
As bar to subsequent prosecution. 68 C. C. A. 4.

NON COMPOS MENTIS.
Contracts of persons non compos mentis under guardianship. 34 C. C. A. 264.

NONMAILABLE MATTER.
Obscene matter. 30 C. C. A. 79.
Frauds and counterfeiting. 30 C. C. A. 86.
Lotteries. 30 C. C. A. 90.
Injurious notices. 30 C. C. A. 93.
Threatening and dunning postal cards. 30 C. C. A. 94.

NONRESIDENTS.
Taxation of property. 31 C. C. A. 467.

NOTICE.
Sufficiency of notice of dissolution of partnership. 54 C. C. A. 229.
To agent—Adverse interest, fraud, or collusion of agent. 56 C. C. A. 561.
Time for notice of loss under insurance policy. 55 C. C. A. 376.
Of insurance, premiums, dues, and assessments. 59 C. C. A. 317.

OBITER DICTUM. 64 C. C. A. 361.

OBSCENE MATTER.
Nonmailable matter. 30 C. C. A. 79.

OFFICE AND OFFICER.
Jurisdiction of federal courts in suits against federal officers. 11 C. C. A. 316.
Torts of public officers. 14 C. C. A. 534.
Liabilities of sureties for acts of officers under color of office. 43 C. C. A. 222.
Validity of contracts with public officers as affected by illegality of object or consideration. 56 C. C. A. 10.

ORDERS.
Power of court to amend or modify interlocutory orders and decrees. 61 C. C. A. 236.

Digitized by Google

PARAPHERNAL PROPERTY.
What constitutes. 31 C. C. A. 40.

PARENT.
Death of child by wrongful act—Damages. 1 C. C. A. 34.
Implied emancipation of child. 71 C. C. A. 629.
Evidence of emancipation of child. 75 C. C. A. 393.

PARTIES.
Citizenship as affecting the jurisdiction of the federal courts. 10 C. C. A. 254; 27 C. C. A. 298; 32 C. C. A. 479.
Names of, in deeds and mortgages. 23 C. C. A. 146.
Persons entitled to enforce specific performance. 47 C. C. A. 493.
Persons entitled to injunction restraining or damages for wrongful enforcement of tax. 54 C. C. A. 550.
Fraudulent joinder to prevent removal of cause to federal court. 78 C. C. A. 362.
Who may be parties in actions by or against associations. 82 C. C. A. 270.

PARTITION.
Of mineral rights or lands. 81 C. C. A. 405.

PARTNERSHIP.
Use of partnership name as trade-name. 17 C. C. A. 579; 27 C. C. A. 357.
Mining partnerships. 35 C. C. A. 515.
Purchase of co-partner's interest. 40 C. C. A. 508.
Liability of partnership for torts of partner. 45 C. C. A. 277.
Power of corporation to form partnership. 50 C. C. A. 131.
Sufficiency of notice of dissolution of partnership. 54 C. C. A. 229.
Liability of corporation succeeding to partnership for debt of firm. 80 C. C. A. 560.

PASSENGERS.
Duty of carrier to protect from dangerous fellow passengers. 4 C. C. A. 231.
Right of carrier to restrain or expel disorderly passenger. 4 C. C. A. 231.
Duties and liabilities of sleeping-car companies towards. 10 C. C. A. 335; 34 C. C. A. 386.
Rights against carriers for injuries caused by negligence or torts of servants. 10 C. C. A. 466; 27 C. C. A. 651.
Rights of persons traveling on a pass. 31 C. C. A. 164.
Burden of proof of negligence for injuries to. 32 C. C. A. 23.
Limitation of carrier's liability for injuries to passengers. 32 C. C. A. 301.

PASSENGERS—Cont'd.
Limitation of carrier's liability for injuries to passenger by condition on ticket. 32 C. C. A. 302.
Limitation of liability by carrier for injuries to passenger traveling on pass. 32 C. C. A. 305.
Limitation of carrier's liability for injuries to baggage. 32 C. C. A. 308.
Continuance of passenger relation. 40 C. C. A. 437.
Injuries to railroad passengers while occupying positions other than regular seats. 54 C. C. A. 4.
Negligence in ejecting passengers under disability. 62 C. C. A. 422.
Liabilities of connecting carriers for injuries to passengers. 64 C. C. A. 485.
Relation of carrier to persons carried under contract with their employers. 67 C. C. A. 427.
Accommodations to passengers on vessels. 68 C. C. A. 630.

PATENTS.
To public lands—Cancellation. 22 C. C. A. 38.
Conclusiveness of land patents. 28 C. C. A. 346.
Conclusiveness of patents for mining claims. 28 C. C. A. 346; 48 C. C. A. 674.

PATENTS FOR INVENTIONS.
Effect of previous adjudication on circuit court of appeals. 3 C. C. A. 565; 27 C. C. A. 427; 32 C. C. A. 475.
Review of interlocutory decree granting or continuing injunction in circuit court of appeals. 3 C. C. A. 572; 27 C. C. A. 189; 32 C. C. A. 484.
Jurisdiction of federal courts in suits relating to patents. 11 C. C. A. 313.
Pleading in infringement suits—Demurrer for want of novelty and invention. 19 C. C. A. 595.
Laches as a defense in suits for infringement. 22 C. C. A. 211; 36 C. C. A. 613.
Power of patentee to control his invention. 25 C. C. A. 280.
Contributory infringement of patents. 43 C. C. A. 485.
Accounting by infringer for profits. 50 C. C. A. 8.
Time for application for reissue. 55 C. C. A. 560.
Utility, extent of use, and commercial success as evidence of invention. 59 C. C. A. 620.
Sublicenses and assignments of licenses for use or sale of patents. 64 C. C. A. 596.
Amendment of application. 68 C. C. A. 239.
Operation and effect of decision in equitable suit for infringement. 68 C. C. A. 541.
Priority and continuance of public use of invention as affecting patentability. 69 C. C. A. 646.

Digitized by Google

PATENTS FOR INVENTIONS—Cont'd.
Abandonment of invention. 70 C. C. A. 6.
Right to inventions as between employer and employé. 71 C. C. A. 221.
Grounds for denial of preliminary injunctions in patent infringement suits. 72 C. C. A. 123.

PAYMENT.
Implied obligation to pay for benefits received. 2 C. C. A. 488.

PENALTIES.
Imposition of penalty, extra allowance of damages, costs, or fees as denial of equal protection of law. 72 C. C. A. 547.

PERILS OF THE SEA.
Damages to ship and cargo by vermin. 18 C. C. A. 231; 19 C. C. A. 473.
Damages to ship and cargo through various causes. 19 C. C. A. 465; 64 C. C. A. 118.

PHYSICIANS AND SURGEONS.
Expert testimony as to value of services. 74 C. C. A. 257.

PLEADING.
Following state practice. 5 C. C. A. 594; 27 C. C. A. 392.
Averments of citizenship to show jurisdiction in federal courts. 10 C. C. A. 261; 27 C. C. A. 303.
In patent infringement suits—Demurrer for want of novelty and invention. 19 C. C. A. 595.
Private statutes. 67 C. C. A. 241.

PLEDGES.
Rights and liabilities of pledgees of corporate stock. 42 C. C. A. 135.

POST OFFICE.
Nonmailable matter. 30 C. C. A. 79.

PRACTICE.
As regulated by state laws. 1 C. C. A. 515; 5 C. C. A. 594; 9 C. C. A. 548; 27 C. C. A. 392.

PREJUDICE.
As ground for removal of causes. 8 C. C. A. 95.

PRINCIPAL AND AGENT.
Agency implied from course of dealing. 42 C. C. A. 221.
Liability of principal for torts of agent. 43 C. C. A. 316.
Knowledge of agent as notice to principal—Effect of adverse interest, fraud, or collusion of agent. 56 C. C. A. 561.
Election of remedies against undisclosed principal or agent. 77 C. C. A. 166.

PRINCIPAL AND SURETY.
Liabilities of sureties for acts of officers under color of office. 43 C. C. A. 222.

PRINCIPAL AND SURETY—Cont'd.
Death of surety. 49 C. C. A. 591.
Liability of sureties for interest, costs, and attorney's fees. 51 C. C. A. 248.
Discharge of surety on building contract by change in obligation or duty of principal. 52 C. C. A. 427.
Discharge of surety by alteration of instrument. 66 C. C. A. 6.

PROBATE.
Jurisdiction of federal courts. 36 C. C. A. 276.

PROCESS.
Following state practice. 5 C. C. A. 599; 27 C. C. A. 393.
Service on foreign corporations. 45 C. C. A. 3; 78 C. C. A. 473.

PROPERTY.
Obtaining possession or establishing title to personal property in equity. 58 C. C. A. 101.
Distinctions between real and personal property. 82 C. C. A. 602.

PUBLIC FUNDS.
Right of taxpayer to enjoin misuse of public funds and property. 38 C. C. A. 458.

PUBLIC LANDS.
Liability of purchaser holding equitable title to state taxation. 4 C. C. A. 196.
Not subject to state taxation. 4 C. C. A. 196.
Jurisdiction of federal courts in suits under public land laws. 11 C. C. A. 314.
Decisions of land department—Their conclusiveness and effect. 22 C. C. A. 38; 28 C. C. A. 344; 57 C. C. A. 207.
Rights acquired by homestead settlements and entries. 59 C. C. A. 434.
Bona fide purchasers. 67 C. C. A. 13.

PUBLIC POLICY.
As affecting contracts. 9 C. C. A. 666; 34 C. C. A. 486.
Contracts for lobby services. 29 C. C. A. 446.
As affecting monopolistic contracts. 34 C. C. A. 486.

QUIETING TITLE.
Necessity of possession in suits to quiet title. 39 C. C. A. 522.

RAILROADS. See "Carriers."
When land grants taxable. 4 C. C. A. 196.
Duty to give warning signals at crossing. 29 C. C. A. 90.
Rights of trespassers on trains. 31 C. C. A. 76.
Duty of railroad companies to furnish safe appliances. 37 C. C. A. 8.
Location and establishment of stations. 41 C. C. A. 219.
Presumption of negligence from fires. 41 C. C. A. 370.

Digitized by Google

RAILROADS—Cont'd.
Injuries to persons at stations. 41 C. C. A. 550.
Abandonment or forfeiture of right of way. 42 C. C. A. 576.
Duty of railroad companies to block switches. 46 C. C. A. 98.
Liability of railroad or street car companies for ejection of trespassers. 51 C. C. A. 578.
Effect of violation of statutes and ordinances regulating speed of trains. 59 C. C. A. 5.
Negligence in ejecting trespassers under disability. 62 C. C. A. 422.
Acquisition or loss of right to railroad right of way by prescription. 63 C. C. A. 7.
Persons entitled to liens against railroads for labor or supplies. 75 C. C. A. 274.
Liabilities of railroads for injuries by fire as affected by management of locomotives. 75 C. C. A. 598.
Rights and liabilities of stockholders of railroads on consolidation. 81 C. C. A. 480.

RECEIVERS.
Citizenship as affecting the jurisdiction of the federal courts. 10 C. C. A. 253.
Actions by and against receivers of federal courts. 26 C. C. A. 49.
Nature of certificates. 26 C. C. A. 350.
Actions by and against receivers and "agents" of national banks. 53 C. C. A. 398.
Preservation and prevention of removal of property beyond jurisdiction pending litigation as ground for appointment of receiver. 57 C.C.A. 80.

RECORDS.
Access to public records. 49 C.C.A. 210.

REFERENCE.
Following state practice. 27 C. C. A. 392.

REMOVAL OF CAUSES.
As restricted by state laws. 1 C. C. A. 515.
For prejudice or local influence. 8 C. C. A. 95.
Separable controversy. 18 C. C. A. 86; 35 C. C. A. 155.
Actions against federal receivers. 26 C. C. A. 49.
Distinctions between legal and equitable remedies in actions removed to federal courts. 63 C. C. A. 204.
Waiver of right. 66 C. C. A. 612.
Proceedings under power of eminent domain as civil suits under laws relating to removal of causes to federal courts. 73 C. C. A. 183.
Legal and equitable remedies and proceedings on removal from state court. 75 C. C. A. 4.
Fraudulent joinder of parties to prevent removal. 78 C. C. A. 362.

REPEAL OF STATUTES.
Repeal of statutes by implication. 38 C. C. A. 136.

REVIEW.
Necessity of leave to file bill of review after decision on appeal. 4 C. C. A. 72.
In bankruptcy cases. 43 C. C. A. 9.

REWARDS.
Performance of conditions in and acceptance of offer of reward. 79 C. C. A. 98.

RISKS.
Assumption of risk incident to employment. 38 C. C. A. 314.

SALE.
Of patent. 25 C. C. A. 280.
Divisibility of contracts. 30 C. C. A. 470.
Liabilities of venders of injurious substances or defective machinery and appliances for injuries to persons other than immediate vendees. 57 C. C. A. 5.
Contracts for sale of things to be produced or manufactured. 58 C. C. A. 363.

SALVAGE.
Awards in federal courts. 30 C. C. A. 280.

SEAMEN.
Negligence of both master and servant—Division of damages in admiralty. 30 C. C. A. 678.

SEPARABLE CONTROVERSIES.
As ground for removal of cause. 18 C. C. A. 86; 35 C. C. A. 155.

SEPARATION AGREEMENTS. 38 C. C. A. 608.

SET-OFF AND COUNTERCLAIM.
Restraining enforcement of judgment pending establishment or enforcement of set-off or counterclaim. 58 C. C. A. 532.

SHAREHOLDERS.
In national banks. 15 C. C. A. 130; 46 C. C. A. 503.

SHIPPING.
Quick dispatch. 14 C. C. A. 657; 21 C. C. A. 342.
Implied warranty of seaworthiness. 15 C. C. A. 388; 60 C. C. A. 179.
Damages to ships and cargoes by vermin. 18 C. C. A. 231; 19 C. C. A. 473.
Admiralty jurisdiction over contracts. 18 C. C. A. 347; 27 C. C. A. 530.
Loss by perils of the sea. 19 C. C. A. 465; 64 C. C. A. 118.
General average. 20 C. C. A. 357.

Digitized by Google

SHIPPING—Cont'd.
Demurrage. 14 C. C. A. 657; 21 C. C. A. 337; 46 C. C. A. 4.
Carriers by water. 20 C. C. A. 535.
Limitation of owner's liability. 45 C. C. A. 387.
Statutory exemptions of shipowners from liability. 49 C. C. A. 11.
Demise of vessel. 55 C. C. A. 225.
Cancellation, surrender, or rescission of charter of vessel. 61 C. C. A. 569.
Presumptions and burden of proof as to cause of loss or injury to goods shipped by vessel, and diligence or negligence of carrier. 68 C. C. A. 398.
Accommodations to passengers on vessels. 68 C. C. A. 630.
Capacity or authority of master of vessel to hypothecate or make bottomry bond. 75 C. C. A. 123.
Liability of vessel for injuries caused by creation of swell. 78 C. C. A. 3.

SIGNALS.
At railroad crossings. 29 C. C. A. 90.

SLEEPING-CAR COMPANIES.
Their duties and liabilities towards their passengers. 10 C. C. A. 335; 34 C. C. A. 386.

SPECIFIC PERFORMANCE.
Persons entitled to enforce specific performance. 47 C. C. A. 493.
Of contracts requiring performance of continuous acts. 49 C. C. A. 103.
Of contracts of which time is the essence. 63 C. C. A. 562.
Necessity of tender of performance. 65 C. C. A. 91.
Conditions and provisions for relief to defendant in decree in action for specific performance. 79 C. C. A. 188.
Right of vendor seeking specific performance of contract to have title perfected pending suit. 80 C. C. A. 354.
Possession and improvements under parol contract for sale or gift of land as ground for specific performance. 81 C. C. A. 276.
Right to specific performance as affected by adequacy of remedy at law. 82 C. C. A. 368.

STATE COURTS. See "Removal of Causes."
Proceedings enjoined by federal courts. 16 C. C. A. 90; 27 C. C. A. 575; 63 C. C. A. 437.
Jurisdiction of state courts to enforce maritime liens under state laws. 21 C. C. A. 21.
Conclusiveness of judgments between federal and state courts. 21 C. C. A. 478; 49 C. C. A. 468.
Conflict of jurisdiction with federal courts. 22 C. C. A. 356.

STATE COURTS—Cont'd.
Restraining proceedings in federal courts. 45 C. C. A. 591.
Pendency of action in state or federal court as ground for abatement of action in the other. 47 C. C. A. 205; 73 C. C. A. 521.

STATES.
Federal jurisdiction in suit against state. 13 C. C. A. 165.
Estoppel against. 16 C. C. A. 353.

STATUTES.
Construction of statutes—State laws as rules of decision in federal courts. 11 C. C. A. 72.
Constitutional and statutory limitations of municipal indebtedness. 36 C. C. A. 6.
Statutory exemptions of building and loan associations from operation of usury laws. 36 C. C. A. 343.
Repeal of statutes by implication. 38 C. C. A. 136.
Power of legislature to pass curative statutes. 39 C. C. A. 180.
Amendment of amended, repealed, or invalid statutes. 44 C. C. A. 590.
Effect of violation of statutes limiting speed of trains. 59 C. C. A. 5.
Construction of statutes as affected by mistakes in writing, grammar, spelling, and punctuation. 65 C. C. A. 237.
History and passage of statutes and contemporary circumstances as aids to construction. 65 C. C. A. 535.
Pleading private statutes. 67 C. C. A. 241.
Construction and operation of provisos, exceptions and saving clauses. 76 C. C. A. 381.
Validity of laws alleged to impair charter or franchise of corporation as dependent on reservation of power to alter or amend. 77 C. C. A. 281.

STOCKHOLDERS.
Liability to creditors of corporation. 23 C. C. A. 315; 33 C. C. A. 23.
Enforcement of statutory liability of stockholders in national banks. 52 C. C. A. 6.
Effect of judgment against corporation in action to enforce stockholder's liability. 52 C. C. A. 305.
Liability of transferrors and transferees of corporate stock for assessments. 61 C. C. A. 322.

STREET RAILROADS.
Care required of motormen. 40 C. C. A. 361.
Relative rights of street railroads, and vehicles and pedestrians in use and occupation of streets. 73 C. C. A. 12.

SUBROGATION.
To rights of mortgagee. 42 C. C. A. 304.
Of insurer under assignment of rights of insured. 65 C. C. A. 615.

Digitized by Google

SUICIDE.
As a defense to a suit for life insurance. 16 C. C. A. 623; 28 C. C. A. 284.

SUNDAY.
As dies non juridicus. 12 C. C. A. 462.

SUPREME COURT.
Certiorari to circuit court of appeals. 1 C. C. A. 5.
Jurisdiction. 1 C. C. A. 9, 11.
Review of jurisdiction of circuit courts. 48 C. C. A. 351.

TARIFF LAWS.
Interpretation of commercial and trade terms. 18 C. C. A. 545.

TAXATION.
Of railroad land grants. 4 C. C. A. 196.
Of equitable title to public lands. 4 C. C. A. 196.
Lands of the United States not subject to state taxation. 4 C. C. A. 196.
Due process of law. 8 C. C. A. 398.
Notice of equalization. 8 C. C. A. 400.
Forfeiture for nonpayment. 8 C. C. A. 401.
Regulation and taxation of interstate commerce by state. 8 C. C. A. 492; 24 C. C. A. 21.
Limitations of taxing power from mutual independence of federal and state governments. 23 C. C. A. 515.
Of foreign corporations. 24 C. C. A. 13.
Tax deed as color of title. 24 C. C. A. 402.
Of intangible property of nonresidents. 31 C. C. A. 467.
Persons entitled to injunction restraining or damages for wrongful enforcement of tax. 54 C. C. A. 550.
Of bank deposits. 60 C. C. A. 413.
Impairing obligation of contracts for exemption from taxation. 70 C. C. A. 294.
Place of taxation of property held in trust or other fiduciary capacity. 72 C. C. A. 283.

TELEGRAPHS AND TELEPHONES.
Measure of damages in actions against telegraph and telephone companies. 15 C. C. A. 235; 28 C. C. A. 59.
Damages for mental suffering from delay in delivering telegram. 11 C. C. A. 571; 15 C. C. A. 250; 28 C. C. A. 62.
Delay in transmission of message—Failure to disclose that line was not in working order. 14 C. C. A. 177.
Rights of telegraph and telephone companies to use of streets. 44 C. C. A. 155.

TENANCY IN COMMON.
Rights of co-tenant as to improvements made under mistaken belief of perfect title. 69 C. C. A. 19.

TERRITORIES.
Effect of acquisition of territory by United States on laws and property rights therein. 80 C. C. A. 457.

THREATENING POSTAL CARDS.
Nonmailable matter. 30 C. C. A. 94.

TITLE.
Rights of co-tenant as to improvements made under mistaken belief of perfect title. 69 C. C. A. 19.

TITLE INSURANCE. 19 C. C. A. 278.

TORTS.
Liabilities of carriers for negligence and torts of servants. 10 C. C. A. 466; 27 C. C. A. 651.
Of wife—Liability of husband. 12 C. C. A. 196.
Municipal liability for torts of public officers. 14 C. C. A. 534.
As affecting demurrage. 21 C. C. A. 345.
Maritime liens for torts. 34 C. C. A. 565.
Liability of corporation for torts. 39 C. C. A. 9.
Liability of principal for torts of agent. 43 C. C. A. 316.
Liabilities of charitable institutions for negligence. 47 C. C. A. 134.
Admiralty jurisdiction. 62 C. C. A. 279.
Effect of acquittal in criminal prosecution on liability in tort for alleged criminal act. 79 C. C. A. 407.

TRADE-MARKS AND TRADE-NAMES.
Contracts relating to use. 14 C. C. A. 104.
Assignment of right to use a person's name. 17 C. C. A. 579; 27 C. C. A. 360.
Right to use one's own name. 17 C. C. A. 579; 27 C. C. A. 357.
Use of corporate and firm names. 17 C. C. A. 579; 27 C. C. A. 357.
Use of geographical names. 17 C. C. A. 657; 35 C. C. A. 242.
Unfair competition. 20 C. C. A. 165; 30 C. C. A. 376.
Laches as a defense in suits for infringement. 22 C. C. A. 211; 36 C. C. A. 613.
Misleading or false labels. 29 C. C. A. 250.
Abandonment. 33 C. C. A. 294.
Arbitrary, descriptive, or fictitious character of trade-marks and trade-names. 50 C. C. A. 323.

TRADE SECRETS.
Disclosure. 58 C. C. A. 8.

TRESPASS.
Rights of trespasser on train. 31 C. C. A. 76.
Liabilities of corporations. 39 C. C. A. 15.

Digitized by Google

TRESPASS—Cont'd.
Liability of railroads or street car companies for ejection of trespassers. 51 C. C. A. 578.
Negligence in ejecting trespasser under disability. 62 C. C. A. 422.

TRIAL.
Jury trial in federal court. 5 C. C. A. 603; 26 C. C. A. 528; 27 C. C. A. 393.
Instructing jury and receiving verdict on Sunday. 12 C. C. A. 462.
Comments of counsel on failure to produce witness. 13 C. C. A. 589.
Trial by jury in criminal prosecutions. 39 C. C. A. 275.
Additional proofs in appellate court without trial de novo. 67 C. C. A. 600.
Operation and effect of motions by both plaintiff and defendant for direction of verdict. 77 C. C. A. 8.

TRUSTEES.
Citizenship as affecting the jurisdiction of the federal courts. 10 C. C. A. 252; 27 C. C. A. 300.

TRUSTS.
Assets of corporation when trust fund for creditors. 23 C. C. A. 315.
Place of taxation of property held in trust or other fiduciary capacity. 72 C. C. A. 283.

UNITED STATES.
Estoppel against. 16 C. C. A. 353.
Assignment of claims and government contracts. 22 C. C. A. 650.
Nature and extent of power of United States to condemn property for public use. 70 C. C. A. 653.
Effect of acquisition of territory by United States on laws and property rights therein. 80 C. C. A. 457.

USURY.
Statutory exemptions of building and loan associations from operation of usury laws. 36 C. C. A. 343.
What law governs usury by building and loan associations. 51 C. C. A. 319.

VENDOR AND PURCHASER.
Marketable title. 40 C. C. A. 592.
Liabilities of venders of injurious substances or defective machinery and appliances for injuries to persons other than immediate vendees. 57 C. C. A. 5.
Right of vendor seeking specific performance of contract to have title perfected pending suit. 80 C. C. A. 354.
Deficiency judgments and personal liability on foreclosure of vendors' liens. 82 C. C. A. 488.

WAIVER.
Of prepayment of insurance premiums. 13 C. C. A. 292.
Of maritime liens. 17 C. C. A. 102.
Of conditions of insurance. 27 C. C. A. 46.
Of defense by acceptance of premiums. 33 C. C. A. 369.
Of trial by jury in criminal prosecutions. 39 C. C. A. 281.
Of right as to district in which suit may be brought. 52 C. C. A. 192.
Of right to remove cause to federal court. 66 C. C. A. 612.

WAR.
The neutrality laws. 28 C. C. A. 622.

WAREHOUSEMEN.
Liability of carriers as. 20 C. C. A. 529.

WATERS AND WATER COURSES.
Pollution of water courses. 37 C. C. A. 538.
Abandonment of water rights. 45 C. C. A. 190.

WIFE.
Death of husband by wrongful act—Damages. 1 C. C. A. 33.
Liability of husband for torts of. 12 C. C. A. 196.

WILLS.
Probate jurisdiction of federal courts. 36 C. C. A. 276.

WITNESS.
Competency in federal courts—Following state practice. 5 C. C. A. 602; 21 C. C. A. 278.
Method of summoning — Following state practice. 5 C. C. A. 602.
Comments of counsel in argument on failure to produce. 13 C. C. A. 589.
Competency of, as to general reputation. 53 C. C. A. 109.
Misconduct of witness with reference to cause on trial as ground for impeachment. 71 C. C. A. 411.
Time for objection to competency of witness. 74 C. C. A. 3.
Impeachment and contradiction of party called as witness by adversary. 74 C. C. A. 142.
Excuses for disobedience of subpœnas. 76 C. C. A. 591.
Right of accused to be confronted by witnesses. 80 C. C. A. 116.

WRITS.
Form and service of process. 5 C. C. A. 594.
Issue and service on Sunday. 12 C. C. A. 462.

Digitized by Google

NOTES IN THIS VOLUME.

Page

Admissibility of Written Instruments in Criminal Prosecutions as Dependent on Preliminary Proof 8

Application of Doctrine of Res Ipsa Loquitur in Actions for Injuries to Servants 121

Who May be Parties in Actions by or against Associations 270

Right to Specific Performance as Affected by Adequacy of Remedy at Law 368

Deficiency Judgments and Personal Liability on Foreclosure of Vendors' Liens 488

Distinctions Between Real and Personal Property 602

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS.

(150 Fed. 56.)

SPRINKLE et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 14, 1906.)

No. 606.

1. CRIMINAL LAW—EVIDENCE—DECLARATIONS.

Where defendants on trial were jointly indicted with others charged with carrying on the business of rectifiers in the names of certain companies organized by them with intent to defraud the United States of the internal revenue on their rectified spirits, a typewritten letter purporting to have been dictated by one of the defendants and signed in his name by a rubber stamp or stencil, no part of which was in his handwriting, was inadmissible as against him, in the absence of other evidence sufficient to connect him with the offense charged.

2. SAME—ERRONEOUS ADMISSION OF EVIDENCE—PREJUDICE.

The erroneous admission of evidence against accused in a federal court will be presumed to have been prejudicial unless it is made to appear beyond a doubt that it was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3094.]

3. SAME—ADMISSIBILITY OF TYPEWRITTEN LETTER SIGNED WITH STENCIL.

A letter written wholly on a typewriter, with the signature of the accused thereto appended with a stencil, *held* incompetent as evidence against such accused as a communication purporting to have come from him, unless shown to have been acknowledged by him as his letter, or acquiesced in or acted upon by him.[1]

Pritchard, Circuit Judge, dissenting.

---

[1] See note at end of case.

Digitized by Google

In Error to the District Court of the United States for the Western District of North Carolina.

Spencer B. Adams, W. P. Bynum, Jr., Reuben D. Reid, and E. J. Justice, for plaintiffs in error.

A. E. Holton, U. S. Atty., and A. H. Price, Asst. U. S. Atty.

Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. This case was decided by this court at its November term, 1905 (141 Fed. 811, 73 C. C. A. 285), and is now under consideration upon a petition for rehearing granted at the instance of T. M. Angle and William Young, two of the defendants, the defendant Sprinkle having acquiesced in the judgment of the court.

The case is briefly this: B. F. Sprinkle and the petitioners Angle and Young, together with H. C. Sprinkle and J. T. Sprinkle, were indicted for violations of the internal revenue laws; the indictment containing 10 counts, the first charging the persons named with carrying on the business of rectifying with intent to defraud the United States of the tax on the spirits so rectified; the third, fifth, seventh, and eighth counts with engaging in and carrying on the business of rectifiers of distilled spirits in the names, respectively, of the Oak Grove Liquor Company, the Milton Liquor Company, the Reidsville Liquor Company, and of William Young, with intent to defraud the United States of the tax on the spirits so rectified by them. The second, fourth, and sixth counts charged that said five defendants, respectively, in the name of the three companies aforesaid, knowingly made false entries in certain books required by law to be kept in the rectifying business. The ninth count charged the five defendants with unlawfully and willfully removing and aiding and abetting in the removal of a cask of distilled spirits on which the tax had not been paid as required by law to a place other than the distillery warehouse, and the tenth count with unlawfully concealing said cask of spirits on which the tax had not been paid. The defendants B. F. Sprinkle, T. M. Angle, and William Young, in the absence of the defendants H. C. and J. T. Sprinkle, who had not been apprehended, were jointly tried and convicted on the first nine counts of the indictment, on which judgment was entered, and from which a writ of error was sued out, resulting in the affirmation of the decision of the lower court, from which this rehearing is asked by the two petitioners named.

Many reasons are urged in support of the rehearing, and the same have been elaborately argued orally and in writing, and the conclusion reached is that the judgment heretofore entered should in all respects be adhered to, except as to the ruling of the court upon the twenty-second bill of exception taken upon the trial relating to the admission in evidence of a certain paper purporting to have been written by the petitioner William Young on the 15th day of April, 1902, addressed to Fleischman & Co., wholesale liquor dealers, Cincinnati, Ohio. The subject of this exception is also embodied in the defendant Young's request for instruction No. 90, and forms the ground of one of his assignments of error, and arose as follows: While Charles Haefeli,

Digitized by Google

chief clerk for Fleischman & Co., was on the stand as a witness in behalf of the government, deposing as to certain transactions between his firm and the Reidsville Liquor Company, of Reidsville, N. C., he was asked by counsel for the prosecution to say if he had "any letters or anything that opened correspondence with Fleischman & Co.," to which the witness replied "Yes," and produced the letter dated April 15, 1902, which is as follows:

"Reidsville Liquor Co., Wholesale Liquor Dealers and Rectifiers.
"Wm. Young,
"B. F. Sprinkle, Proprietor.
"Reidsville, N. C., April 15, 1902.

"Mess. Fleischman & Co., Cincinnati, O.—Dear Sir: Please quote me your lowest prices on 50 proof white wheat whiskey f. o. b. Cincinnati, in five bbl. lots containing 50 or more wine gals. to the bbl. I want it to blend low proof corn whiskey with it. If you will figure it down to the right price, I will handle five or ten bbls. per week; let me hear from you at your earliest date.
"Yours truly, Wm. Young."

The said letter was typewritten, the date being stamped with a stencil or rubber stamp, and written upon stationery purporting to be that of the Reidsville Liquor Company, on which the name of B. F. Sprinkle originally in print as proprietor was stamped out, and across the name of said Sprinkle, proprietor, and across words "Liquor Dealer and Rectifier," the name of Wm. Young was stamped with a stencil or rubber stamp, and at the close of the letter the signature "Wm. Young" was likewise stamped with a rubber stamp or stencil. The answer of Fleischman & Co. to this letter was addressed to the Reidsville Liquor Company, which was the beginning of the correspondence between Fleischman & Co. and the Reidsville Liquor Company, and subsequently correspondence was had between said firm and said company, J. T. Sprinkle appearing as the proprietor of the Reidsville Liquor Company, and as a result of which sundry sales of liquor were made by Fleischman & Co. to the Reidsville Liquor Company, and on some of the liquors were used the fraudulent stamps shown by the government to have been issued. The lower court admitted this evidence against the objection of the defendants, stating at the time "that the object of the government in offering the testimony, as stated by the district attorney, was to show by it that the criminal offenses charged in the indictment had been committed, but that the testimony would not be considered by the jury unless subsequent testimony was introduced connecting the defendants, or some of them, with the offense, which the testimony offered tended to prove, and then only as to such of the defendants as might be found to have engaged in the offense."

The view taken by this court at the former hearing was that although the said letter was not in the handwriting of the defendant Young, which might have been sufficient as an independent proposition to have caused its rejection, that the fact that the Reidsville Liquor Company (one of the aliases under which it is alleged said Young did business) received the same and acted thereon so connected Young with the company as to make it competent evidence against him. To this view we still adhere, upon the facts as thus assumed; but upon a careful review of the evidence in the case we are not satisfied with the conclusion then reached, in that it does not appear entirely to our satisfaction that the facts in

Digitized by Google

the case, independent of the letter itself, so identify Young with the commission of the offense alleged against him, or with the Reidsville Liquor Company, as to make him liable for the acts of said company. With the letter in his handwriting in evidence, and the company acting upon the same, it would be conclusive of the guilt of Young as well as of his connection with the company. The letter, however, was admittedly not in his handwriting, and the government should, therefore, before it can use that which was in itself incompetent as evidence either for the purpose of connecting Young with the commission of the crime, or to procure and sustain a verdict against him, establish its case with that degree of certainty necessary to a conviction with such letter excluded. This, we think, the government has failed to do. It is true that many circumstances of suspicion surround the petitioner, Young, and he may be guilty; but without the letter which forms the basis of the exception in question, and the answer thereto, and what was done as a consequence thereof, the defendant's guilt is not established with that degree of definiteness and certainty that should be required in a criminal case. This is particularly true under the federal decisions applicable to the admission and exclusion of evidence, which are to the effect that it should be made to appear beyond a doubt that the improper evidence admitted did not and could not have prejudiced the rights of the party duly objecting. Deery v. Cray, 5 Wall. 795, 807, 18 L. Ed. 653; Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62; Boston R. R. Co. v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; U. S. v. Daubner (D. C.) 17 Fed. 793; Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 64 C. C. A. 180, 189, 129 Fed. 668; State v. Mikle, 81 N. C. 552; State v. Massey, 86 N. C. 658, 41 Am. Rep. 478; State v. Jones, 93 N. C. 611; State v. Goodson, 107 N. C. 798, 12 S. E. 329; Bishop New Cr. Proc. vol. 1, §§ 89, 92, 93, also 1273, 1274, 1275, and 1276, and cases cited.

We find ourselves in the position that we cannot say that the admission of the letter in question may not have injuriously affected the defendant Young, nor can we say that the evidence against him, with such letter excluded, is sufficient to sustain the verdict against him.

The defendants, along with their petition for rehearing, present certain affidavits which they claim constitute ground for a new trial because of after discovered evidence, if in the opinion of the court such motion can be entertained. Without meaning to discuss the question of precedent respecting the application for a new trial on the ground of after discovered evidence in an appellate court, or what disposition should be made of a case in such court upon presentation of affidavits of the kind, we think that at least the party accused presenting such motion and affidavits should bring himself strictly within the rule applicable to the granting of new trials upon after discovered evidence, which the petitioners in the case have failed to do.

The judgment, therefore, of the lower court, in so far as it affects the defendant Young, will be reversed, the cause remanded to that court, with instructions to award a new trial therein, such new trial to be proceeded with in accordance with the views herein expressed; and the application of the defendant Angle for a rehearing will be overruled, and the former judgment as to him in all respects affirmed.

Digitized by Google

PRITCHARD, Circuit Judge (dissenting). After a careful consideration of the petition filed herein for a rehearing, and argument of counsel in support of the same, as well as the brief and argument of the district attorney, contra, I concur in the opinion of the court in so far as it relates to the defendant Young. Notwithstanding the fact that I concurred in the opinion of the court as to the defendant Angle, when this case was before us in the first instance, after a further consideration of the questions involved, I feel impelled to dissent from the judgment of the court in refusing to grant the defendant Angle a new trial. The learned judge who tried this case submitted certain evidence to the jury which in my opinion was incompetent, inasmuch as the defendants are not charged with a conspiracy.

The indictment charges B. F. Sprinkle, H. C. Sprinkle, J. T. Sprinkle, William Young, and T. M. Angle, in the first, third, fifth, seventh, and eighth counts, with violating section 3317, Revised Statutes [U. S. Comp. St. 1901, p. 2164], by engaging in and carrying on the business of rectifiers of distilled spirits with intent to defraud the United States of the tax upon the spirits so rectified by them. The second, fourth, and sixth counts charge the defendants with violating section 3318, Revised Statutes [U. S. Comp. St. 1901, p. 2164], in making false entries upon their books, and the ninth count charges a violation of section 3296 [U. S. Comp. St. 1901, p. 2136] by removing and aiding and abetting in the removal of one cask of distilled spirits on which the tax had not been paid as required by law to a place other than a distillery warehouse as provided by law.

A joint offense being charged in the indictment, it is insisted that the offense was proved by showng the unlawful acts and conduct of J. T. Sprinkle and others. Not only the acts, but the declarations of J. T. Sprinkle and others than the defendant Angle, were offered as evidence, and the court below submitted the same to the jury to be considered in determining the guilt or innocence of all the defendants then on trial. This testimony could only have been properly submitted to the jury as evidence against the defendant Angle upon the theory that he was connected with the Oak Grove Liquor Company, the Milton Liquor Company, and the Reidsville Liquor Company. The mere fact that a joint offense is charged, in the absence of proof connecting the defendant Angle with the offense alleged to have been committed, would not be sufficient to justify the admission of evidence against him as to the acts and declarations of those defendants against whom the evidence was sufficient to sustain a verdict of guilty upon the charges contained in the indictment. This being a case where no conspiracy is charged or shown to have existed, the unlawful acts and declarations of the other defendants would be incompetent as evidence against the defendant Angle. The order of the introduction of testimony is discretionary with the presiding judge, but it is a well-settled rule that where evidence as to declarations and acts of co-defendants is admitted which at the time of its introduction does not show that the defendant (as, in this instance, the defendant Angle) was present or participating in the commission of the unlawful acts necessary to constitute the offense, and where at the close of the testimony the prosecution has offered no evidence to connect the defendant with the

Digitized by Google

unlawful acts and conduct of his co-defendants, then it is the duty of the court, before submitting the case, to instruct the jury that in determining the guilt or innocence of such defendant they should not consider such evidence. Therefore the evidence as to the declarations and acts of the defendants Sprinkle was incompetent as against the defendant Angle, and the submission of the same to the jury without qualification tended to prejudice the cause of such defendant, and should have been excluded.

To sustain the ruling of the court below, wherein the court admitted as evidence against the defndant Angle the declarations of J. T. Sprinkle and others as a part of the res gestæ, the case of St. Clair v. United States, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936, is relied upon. In that case the defendants were jointly charged with the murder of the deceased, and the acts, appearances, and declarations of each as to how the homicide occurred were admitted as a part of the res gestæ. The court, in discussing this phase of the question, said:

"Exceptions were taken, at different stages of the trial, to the admission, against the objection of the accused, of evidence as to the acts, appearance, and declarations of Sparf and Hansen. These objections seem to rest upon the general ground that the indictment did not charge St. Clair, Sparf, and Hansen as co-conspirators. The evidence was not for that reason to be rejected. St. Clair, Sparf, and Hansen were charged jointly with having killed and murdered Fitzgerald. The acts, appearances, and declarations of either, if part of res gestæ, were admissible for the purpose of presenting to the jury an accurate view of the situation as it was at the time the alleged murder was committed. Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence. These surrounding circumstances, constituting part of the res gestæ, Greenleaf, says, 'may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult if not impossible, to bring this class of cases within the limits of a more particular description.' 1 Greenleaf, Ev. (12th Ed.) p. 108. See, also, 1 Bishop, Crim. Pro., pp. 1083–1086."

The crime was committed on board a ship, and the evidence as to what each defendant said and did at the time the deceased was murdered, and also as to what was said and done in attempting to remove the evidence which tended to show his death while on shipboard, was held to be a part of the res gestæ. Each person against whom evidence was offered was present at the time the unlawful acts were committed and declarations were made of which evidence was introduced. From the very nature of things the acts and declarations of each defendant charged with an offense, it being shown that they were present and participating either by acts or declarations at the time of the commission of the offense, as in the case, supra, such acts and declarations under well-established rules of evidence would be competent as a part of the res gestæ.

The court in the case of St. Clair v. United States, supra, quotes from Wharton on Evidence, p. 259, as follows:

"The res gestæ may be, therefore, defined as those circumstances which are the undesigned incidents of a particular litigated act and which are admissible when illustrative of such act. These incidents may be separated from the act

Digitized by Google

by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander. They may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand in immediate casual relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act."

It will be observed that the distinguished author, in referring to the acts of the defendant when treated as a part of the res gestæ, says that "their sole distinguishing feature is that they should be necessary incidents of the litigated act; necessary in this sense, that they are a part of the immediate preparations for or emanations of such an act, and are not produced by the calculating policy of the actors."

The litigated act in the trial in the case at bar was the running of the business of a rectifier by the defendant Angle with intent to defraud the government or knowingly making false entries while engaged in such business under the names and styles as charged in the indictment. In order to render the acts and declarations of the other defendants competent evidence as a part of the res gestæ against the defendant Angle, it was necessary to show that he was concerned in the unlawful acts as a participant or a bystander, and there is no evidence in the record which tends to show either. The declarations of J. T. Sprinkle would have been competent as against H. C. Sprinkle if he had been on trial, inasmuch as the record discloses the fact that such declarations were in immediate and casual relation with the acts charged against H. C. Sprinkle; but, there being no evidence to show that Angle was either present or participating, such evidence was incompetent to be considered by the jury as against the defendant Angle. If it had been shown by the evidence that the defendant Angle was connected with the commission of the crime—that is, in this case, the unlawful use of low proof stamps and the other unlawful acts charged —then the acts and declarations of the other defendants relating to the same would have been competent evidence as against this defendant, but it does not appear that the defendant Angle was concerned in the unlawful acts as a participant or bystander, and therefore the acts and declarations of his co-defendants were inadmissible as evidence against him. If I am correct as to the rule pertaining to this character of evidence, and it should be excluded on that ground, then there was not sufficient evidence to justify the submission of the same to the jury as to the guilt of the defendant Angle.

In the case of State v. Massey, 86 N. C. 658, 41 Am. Rep. 478, the court, in discussing the amount of evidence sufficient to submit the case to the jury, among other things, said:

"It must be established by evidence that does more than raise a mere suspicion, a conjecture, or possibility, for evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict, and should not be left to the

Digitized by Google

jury." State v. Goodson, 107 N. C. 798, 12 S. E. 329; Coffin v. U. S., 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481.

While there are some circumstances shown by the evidence other than the acts and declarations to which I have alluded which might create a suspicion as to the guilt of the defendant Angle, at the same time, this evidence is purely conjectural, and it is not sufficiently definite to show that he was connected with either of the liquor establishments wherein it is alleged that frauds were committed, and therefore would not justify the jury in inferring his guilt therefrom. It is true there was evidence that the defendant Angle had business dealings with the Oak Grove Liquor Company, Reidsville Company, and the Milton Liquor Company, but there is nothing in this evidence to show that there was anything illegally done by him in these transactions. It was not shown that any wholesale liquor dealer's stamp was found in the possession of Angle which had been raised or otherwise altered. Neither was it shown that any packages of distilled spirits in the possession of the defendant were used for the purpose of defrauding the government. So far as it appears from the evidence, the conduct of the defendant Angle in his business transactions with these companies was legitimate and proper. The evidence of the witness W. W. Cooper was chiefly relied upon by the government to secure the conviction of the defendant, but a careful analysis of the same shows that there was nothing in this evidence when considered in the light of all the testimony of this witness to justify the jury in arriving at the conclusion that the defendant was connected with either the Oak Grove, the Reidsville, or the Milton Liquor Company. This is equally true as to the testimony of the witness Satterfield. The acts and declarations of the defendants Sprinkle, in my opinion, being incompetent, I do not think there was sufficient evidence upon which to sustain a verdict of guilty as to the defendant Angle.

The defendant when placed on trial was presumed to be innocent, and this presumption amounted to proof in his behalf, and could not be overcome until evidence was offered which was strong enough to satisfy the jury as to his guilt beyond a reasonable doubt, and, the evidence being purely conjectural and speculative, I think it was the duty of the court to have instructed the jury that there was not sufficient legal evidence to justify them in returning a verdict of guilty, and that it should have directed a verdict of not guilty as to the defendant Angle.

NOTE.

Admissibility of Written Instruments in Criminal Prosecutions as Dependent on Preliminary Proof.

I. In General.

[a] (Ala. 1875) Where an instrument is not admissible without proof of its genuineness, preliminary proof made before the judge to authorize its introduction does not relieve the party offering it from proving its execution to the jury on the trial.—Jordan v. State, 52 Ala. 188.

[b] (Fla. 1896) An instrument fraudulently altered since execution may be admitted for the state on testimony of a witness that he is familiar with defendant's handwriting, and has often seen him write, and that, while it is difficult to state positively that the alteration is in defendant's handwriting,

Digitized by Google

yet on good faith and on his knowledge it is.—Thalheim v. State, 38 Fla. 169, 20 South. 938.

[c] (Mo. 1881) An instrument purporting to be written by defendant is not admissible against him until it is shown to be in his handwriting.—State v. Grant, 74 Mo. 33.

II. LETTERS.

[a] (Cal. 1900) Letters addressed by one secret society to another, directing the latter to inform defendant that the friends of one whom he had killed and the officers of the law were upon his track, in order that he might change his residence, and which were found in the possession of defendant at the time of his arrest, are not admissible on the trial of defendant for homicide, where it does not appear that defendant was in any way connected with the sender of the letters, nor that he acted upon their contents.—People v. Lee Dick Lung, 129 Cal. 491, 62 Pac. 71.

[aa] (Fla. 1896) On a trial for embezzlement by an alleged agent, letters found in letter files kept by defendant in the office recently occupied by him, in the handwriting of his principal, touching the matter of the agency, were admissible on the question of agency, where they appeared to have been invited by letters from defendant, and to have been acted on by him in the course of the agency.—Thalheim v. State, 38 Fla. 169, 20 South. 938.

[b] (Ga. 1886) On trial for assault with intent to rape, a letter written after the assault, and forwarded by the prosecutrix to defendant by a witness who testifies that she instructed him to deliver it personally to defendant, and that he recognizes the letter offered by a blot which he observed when defendant opened it, is admissible in evidence without any proof of the prosecutrix's handwriting, though she denies all knowledge of it.—Smith v. State, 77 Ga. 705.

[c] (Ga. 1905) Though witnesses for the state on direct examination testified that they received and saw certain letters written by defendant, and on cross-examination stated that they did not know that defendant wrote the letters or was advised of their contents, they should have been excluded, and they were not rendered admissible because on redirect examination the witness stated that the name of the defendant was signed to the letters, and referred to the husband, and some of them were directed to him and some to the witness, and came from a city where she said she intended to go, though they did not know she was there except the fact that the letters came from there.—Campbell v. State, 123 Ga. 533, 51 S. E. 644.

[d] (Ill. 1888) A letter threatening to kill deceased and his brother, purporting to have been written to the latter by defendant, which appears to have been intended for them both, and which defendant has admitted to the brother that he wrote, is properly admitted, especially as against a general objection.—Westbrook v. People, 126 Ill. 81, 18 N. E. 304.

[dd] (Iowa, 1895) Witness was asked whether, in a letter received by him, the writer made a statement of what he claimed was a confession made by defendant. *Held*, that the question was proper to identify the letter, and did not call for secondary evidence as to the contents.—State v. Seymour, 94 Iowa, 699, 63 N. W. 661.

[e] (Iowa, 1899) In a prosecution for seduction, it is error to permit a witness to testify as to the contents of a material letter he saw in the room of the prosecutrix, when the only evidence connecting defendant therewith is that defendant's name was subscribed thereto.—State v. McGinn, 109 Iowa, 641, 80 N. W. 1068.

[f] (La. 1898) A letter written by the accused while in jail, and, without being closed or sealed, handed to another prisoner to be sealed and mailed to a witness of the accused, is competent evidence against the accused, though the person to whom it was intrusted surreptitiously read it, and afterwards handed it to a deputy sheriff, instead of mailing it.—State v. Renard, 50 La. Ann. 662, 23 South. 894.

[g] (Md. 1884) On the trial of A. for larceny, a letter was introduced, shown to have been received from the hands of A.'s financée, who, in answer to the question who wrote that letter, answered, "A. I told you that before," but on cross-examination said that the handwriting looked like A.'s, but that she

Digitized by Google

would not swear to his handwriting unless she saw him write. *Held*, that the letter was admissible.—Gross v. State, 62 Md. 179.

[h] (Mo. 1894) The admission in evidence of letters written, but not signed, by defendant, is not error.—State v. Winingham, 124 Mo. 423, 27 S. W. 1107.

[i] (Mo. 1895) In a prosecution of a stepfather for defiling his stepdaughter, letters to the daughter, written by him at the dictation of his wife, are admissible against him, though signed only by the wife.—State v. Sibley, 31 S. W. 1033.

[j] (Mo. 1899) Letters confessing the perpetration of the murder of defendant's wife and children, found on a stand in his house, near their bodies, after the homicide, and dated on the day of the homicide, where written on defendant's letter heads, and signed with his name, and spattered with blood, and where defendant immediately fled from the state, are admissible, without proof of defendant's handwriting.—State v. Soper, 148 Mo. 217, 49 S. W. 1007.

[jj] (Mo. 1907) Where the half-brother of accused testified that accused had sent certain letters, and that accused had admitted sending them, there was a sufficient foundation laid for the admission of the letters.—State v. Hubbard, 100 S. W. 586.

[k] (Mont. 1904) Where, on a criminal prosecution, the state offered in evidence a letter claimed to have been written by accused, and a witness testified that he was familiar with defendant's handwriting, and that the letter looked like his writing, and that the signature was his signature, there was a sufficient identification of the letter as one written by defendant.—State v. Howard, 30 Mont. 518, 77 Pac. 50.

[l] (N. Y. 1896) Evidence of admissions by a defendant in a criminal prosecution that he wrote a letter to a girl, and that it contained an envelope for a reply, addressed to a certain street and number, is not sufficient to authorize the admission in evidence of any particular letter; neither the name of the girl, the place where sent, nor the time being mentioned.—People v. Corey, 148 N. Y. 476, 42 N. E. 1066.

[m] (N. Y. 1899) Defendant had been employed to sell a valuable violin. It was thereafter stolen from the premises of the owner. Defendant prepared an advertisement offering a reward, which he gave to the owner to have published. After the preparation of such advertisement, the owner received a letter, offering to return the violin for a reward. An expert, after having stated that he had compared the two writings, testified that the writing of the letter was similar to the handwriting of the advertisement. Witnesses for defendant swore that the writing of the advertisement was not in the handwriting of defendant, and one witness swore that he wrote it. *Held*, that the letter was admissible in evidence; the basis laid for it by the expert being the proper foundation for its admission.—People v. Flechter, 44 App. Div. 199, 60 N. Y. Supp. 777, 14 N. Y. Cr. R. 328.

[mm] (Or. 1901) Evidence of two witnesses that they knew the defendant's handwriting, and that they believed a letter which was found in the deceased's bedroom after the homicide was written by defendant, and evidence that while defendant was in jail a copy of the letter was read to him, and he admitted writing the original, was sufficient to show the letter was written by defendant, and to render it admissible against him.—State v. McDaniel, 39 Or. 161, 65 Pac. 520.

[n] (S. D. 1900) Where, on a prosecution for murder, a witness was shown a letter purporting to have been written by defendant, and he testified he received it in due course of mail, that it was from defendant, and that his name was attached to it, there was not sufficient foundation for the admission of the letter, it not appearing that witness was familiar with the writing of defendant.—State v. Hall, 14 S. D. 161, 84 N. W. 766.

[nn] (S. D. 1904) Where defendant, while in jail, handed a letter to one of his guards, with directions to deliver it to the addressee, and the defendant's brother and sister testified that it was in defendant's handwriting, its genuineness was sufficiently proven to admit it in evidence for purpose of comparison of handwriting.—State v. Coleman, 17 S. D. 594, 98 N. W. 175.

[o] (Tex. 1900) Where, on a trial for obtaining goods by false pretenses contained in a letter, a witness testified it was handed him in his store with-

Digitized by Google

out an envelope, with other letters composing the morning's mail, by the man who customarily opened the mail and handed him the letters for his department, sufficient predicate was not laid for the admission of the letter in evidence.—Cowan v. State, 41 Tex. Cr. R. 617, 56 S. W. 751.

[oo] (Tex. 1900) On a trial for rape, it was error to admit in evidence letters of a damaging nature, alleged to be in the handwriting of defendant, but which were not addressed to the prosecutrix nor to any one else, nor signed by any one, and which were not shown to have ever been in the possession of the prosecutrix, nor traced from defendant to her, nor to any one for her, nor to have been written by defendant to her.—Duckworth v. State, 42 Tex. Cr. R. 74, 57 S. W. 665.

[p] (Tex. 1906) In a criminal prosecution, where the sheriff testified to his belief that the signature to a letter purporting to be defendant's was the same writing as that signed to an appearance bond, it was error to permit the introduction of such letter without further proof.—Jordt v. State, 95 S. W. 514.

[q] (Tex. 1906) In a criminal prosecution, letters from the defendant, although relevant and shown to have been received in the regular course of mail, were not admissible without proof that the defendant signed the letters, or authorized his name to be signed to them.—Taylor v. State, 97 S. W. 474.

[r] (Utah, 1906) In a prosecution for adultery, the state claimed that a number of letters had been written by defendant's alleged paramour to him, and that she had received replies containing incriminating matter, all but one of which replies were typewritten, and all of which were unsigned. The alleged paramour, though admitting that she had seen defendant write but once, testified that the handwriting of the only letter not typewritten was that of defendant, and that the address on the envelope of one of the typewritten letters was also in defendant's handwriting. *Held*, that the letters were admissible in evidence against defendant.—State v. Freshwater, 30 Utah, 442, 85 Pac. 447.

[s] (Wis. 1902) There is sufficient proof that letters are in defendant's handwriting to allow of their admission, a witness having stated he had seen defendant write a little, and thought they were in his handwriting, and a bank cashier, accustomed to examining handwriting to ascertain its genuineness, having, on comparison of them with a signature of defendant's, given his opinion that the same person wrote them.—Monteith v. State, 114 Wis. 165, 89 N. W. 828.

[t] (Wis. 1905) In a prosecution for arson, evidence of the identity of an anonymous letter received by a priest concerning the fire, claimed to have been written by defendant, *held* sufficient to justify the reception of the letter in evidence.—Colbert v. State, 125 Wis. 423, 104 N. W. 61.

III. Envelopes, Postal Cards, or Other Written Communications.

[a] (Kan. 1897) It is not permissible, in order to prove the presence of the two defendants at a point a few miles from the scene of the crime, a few hours previous to its commission, to receive in evidence a mailed envelope, addressed to one of them, and having on it the return card of the other, where its genuineness as sent by one and received by the other is not shown, nor the connection of the receiver with it shown by proof of its previous possession by him, or inferable from any other fact than his name and address written thereon.—State v. Shive, 58 Kan. 783, 51 Pac. 274.

[b] (Mo. 1905) Where, in a criminal case, it is shown that a certain letter is in defendant's handwriting, and that it was received through the mail by the person to whom it was written, it is not error to admit the envelope, though the address is not shown to be in defendant's handwriting.—State v. Harvey, 131 Mo. 339, 32 S. W. 1110.

[c] (Mont. 1900) Where a prosecutrix in a rape case receives a note urging her to deny everything, not to sign or say anything, and to remember her promise, and promising that "we" will be happy yet, and she testifies that she has seen the defendant's handwriting, and thinks the note is in his handwriting, though unable to swear positively that it is so, such testimony is a sufficient foundation for the reception of the note in evidence against the defendant.—State v. Mahoney, 24 Mont. 281, 61 Pac. 647.

Digitized by Google

[d] (N. M. 1900) An anonymous communication, containing an implied threat, is admissible in evidence in connection with the testimony of the defendant, charged with murder, showing his belief, and the grounds of such belief, that the threat was attributable to the deceased.—Territory v. Pratt, 10 N. M. 138, 61 Pac. 104.

[e] (N. Y. 1899) It is not necessary to prove the writing on a postal card to be that of defendant, when he has admitted that he wrote it, to make it admissible in evidence.—People v. Pullerson, 159 N. Y. 339, 53 N. E. 1119.

[f] (Vt. 1898) Where, during imprisonment before trial, one co-defendant handed a note to the jail housekeeper to give to the other co-defendant, asking him not to turn state's evidence and "go back on her," evidence of the contents of such note is admissible without proof that such former person wrote it.—State v. Marsh, 70 Vt. 288, 40 Atl. 836.

IV. DEEDS, CONTRACTS, BILLS OF SALE, OR MEMORANDA.

[a] (Ala. 1839) The fact that the prosecuting attorney gave notice to the defendant to produce a certain bill of sale on the trial does not authorize the latter to introduce it in evidence without proof of its execution.—State v. Wisdom, 8 Port. 511.

[b] (Ala. 1907) In a prosecution for obtaining property by false pretenses under a contract to perform services, a written contract executed by accused, who made his mark, when proven by subscribing witnesses who signed his name, is admissible.—Campbell v. State, 43 South. 743.

[c] (Cal. 1875) If an indictment for embezzlement contains what purports to be a copy of an agreement made between the defendant and the prosecutor, a copy of the same is not admissible in evidence on the trial without proof of the execution of the instrument by the defendant.—People v. Hust, 49 Cal. 653.

[d] (Ga. 1852) A memorandum made in pencil, in the pocketbook taken from the accused, upon his arrest, may be read in evidence, without proof of its execution.—Whaley v. State, 11 Ga. 123.

[e] (Mich. 1907) Where, in a prosecution of a bank cashier for embezzlement, it appeared that defendant had obtained currency from another bank by means of a memorandum check, the court did not err in receiving evidence outside the check for the purpose of showing that the same was a mere memorandum.—People v. Messer, 111 N. W. 854.

[f] (N. C. 1827) On trial for larceny, where a bill of sale is introduced as a forgery, for the purpose of supporting the credit of a witness, the subscribing witness need not be called.—State v. Wier, 12 N. C. (1 Dev.) 363.

[g] (S. C. 1856) A bill of sale offered by one charged with negro stealing, to account for his possession of the slave, was not received as evidence on the mere proof of the handwriting of a subscribing witness.—State v. Chaney, 9 Rich. Law, 438.

[h] (Tex. 1880) Under Rev. St. art. 2257, providing that instruments required to be recorded shall be admissible in evidence without proof of execution, if they are filed among the papers of the suit three days before commencement of the trial, and notice is given to the opposite party, a copy of a deed is not admissible without proof of execution, in a prosecution for forging the certificate of acknowledgment, unless the terms of the act are strictly complied with.—Johnson v. State, 9 Tex. App. 249.

[i] (Tex. 1880) It was error to admit against defendant a bill of sale purporting to be signed by him, without proof of his execution thereof.—Langford v. State, 9 Tex. App. 283.

[j] (Tex. 1903) On a prosecution for horse theft, a bill of sale of the horse, executed by a third party, and offered in evidence by defendant, was inadmissible, in the absence of proof of its execution by its attesting witness.—Godwin v. State, 44 Tex. Cr. R. 599, 73 S. W. 804.

V. CERTIFICATES, APPLICATIONS, OR WRITTEN REQUESTS.

[a] (Ill. 1902) On a prosecution for violation of the county civil service act (1 Starr & C. Ann. St. [2d Ed.] p. 1102) in issuing a certificate to an applicant without a competitive examination, proof that the persons whose names

Digitized by Google

were signed to the certificate were the president and secretary, respectively, of the board, and had in use in their office a stamp similar to one on the certificate, is sufficient, until overcome by proof, to admit in evidence the certificate without proof of such signatures.—Morrison v. People, 196 Ill. 454, 63 N. E. 989.

[b] (Iowa, 1890) In an action by the state to recover of a registered pharmacist the penalty prescribed by statute for selling intoxicating liquors to a person in the habit of becoming intoxicated, papers purporting to be applications from such person to defendant for the purchase of intoxicating liquors, which are produced from the county auditor's office, and are testified to by defendant himself, as appearing to be in his handwriting, are sufficiently identified to be admitted in evidence, though the usual sworn certificate is not attached, and the deputy auditor testifies that defendant. in making his report of sales, always made a sworn certificate.—State v. Oeder, 80 Iowa, 72, 45 N. W. 543.

[c] (Or. 1888) On a murder trial, papers containing requests to testify in defendants' behalf are inadmissible in evidence on a mere showing that the papers had been delivered by some one—it not appearing by whom—to others, for transmission to the persons upon whom the request was made, and there being no proof that defendants prepared the papers.—State v. Chee Gong, 16 Or. 534, 19 Pac. 607.

VI. Book Entries, Receipts, or Diagrams.

[a] (U. S. 1906) Entries regularly made in the books of a business concern in the usual course of business and contemporaneously with the transactions which they record, especially when supported by the testimony of the employé who made them as to their correctness, are admissible as evidence of the facts shown thereby in a suit between third persons, or on the trial of a criminal prosecution against third persons.—United States v. Greene (D. C.) 146 Fed. 793.

[b] (Ala. 1903) Where a diagram was introduced in evidence in a criminal case, it was immaterial that its correctness was not proved prior to its admission, it being subsequently proved by defendant's testimony.—Jarvis v. State, 138 Ala. 17, 34 South. 1025.

[c] (N. M. 1907) Where a diagram made by a witness offered as illustrating his testimony, was shown to be correct on his cross-examination, it was properly exhibited to the jury.—Territory v. Emilio, 89 Pac. 239.

[d] (Tex. 1900) A receipt, offered in evidence by the accused on a trial for embezzlement to prove the money in his care was paid to the corporation to whom his principal directed it to be paid, was inadmissible, where he merely testified that he received it through the mail, without showing that he knew who signed it or who was authorized to do so.—Templeton v. State, 57 S. W. 831.

VII. Process.

[a] (Tex. 1903) In a trial for resisting an officer who was attempting to serve a writ of sequestration, fair on its face and issuing from a proper court, it was not necessary, before introducing the writ, to prove a valid affidavit for the same.—Meador v. State, 44 Tex. Cr. R. 468, 72 S. W. 186.

Digitized by Google

(152 Fed. 622.)

W. T. CARTER & BRO. v. KIRBY LUMBER CO. et al.*

(Circuit Court of Appeals, Fifth Circuit. April 2, 1907.)

No. 1,580.

BOUNDARIES—RETRACING OLD SURVEY—REVERSAL OF CALLS.

In a case of disputed boundary, where the proof goes to the extent of showing that part of the survey was made on the ground, the calls may be reversed and the lines traced the other way, whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 52, 66–69.]

Appeal from the Circuit Court of the United States for the Southern District of Texas.

Geo. A. Byers and C. L. Carter, for appellants.

Frank Andrews and Sam Streetman, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The question involved on this appeal is as to the proper location of the north line of section 4, a school section of railroad land in Tyler county, Tex., originally surveyed August 4, 1874, by M. L. McAlister, deputy surveyor of Tyler county. The field notes are:

"Field notes of a survey of (640) six hundred and forty acres of land made for the B. B. B. & C. R. R. R. Company, it being the quantity of land to which they were entitled by virtue of certificate No. 647 issued to said company by W. S. Hotchkiss, Com. Claims, March 30th, 1860. Said survey is No. 4 in block No. 1, situated in Tyler county on the waters of Billums creek, a tributary of the Neches river, about 15 miles N. 12° W. of Woodville. Beginning on the N. line of Sect. No. 1 at the S. W. cor. of Sect. No. 2, a stake, from which a pine brs. N. 6 vrs. Thence N. on W. line of Sect. No. 2, at 1,312 vrs. S. line of J. Crews survey, a rock for cor. from which a pine brs. S. 10° E. 2 vrs. Thence W., at 164 vrs. S. W. cor. of the same, a stake, from which a pine brs. N. 55° E. 14 vrs. and a pine brs. S. 66° W. 8 vrs. Thence N. with W. line of same, at 1,150 vrs. its N. W. cor. on S. line of C. C. Tarver's survey, a stake, from which an elm brs. N. 4° E. 5 vrs. and a sweet gum brs. S. 55° E. 11 vrs. Thence W., at 450 vrs. C. C. Tarver's S. W. cor., a stake, from which a red oak brs. S. 35° E. 5 vrs. and a pine brs. N. 15° W. 6 vrs. Thence S. 310 vrs., cor. stake, from which a pine brs. S. 23° E. 7 vrs. and a pine brs. N. 7° W. 8 vrs. Thence W., at 1,064 vrs. cor. stake, from which a sweet gum brs. S. 12° E. 5 vrs. and a pine brs. S. 45° E. 3 vrs. Thence S., at 2,152 vrs. the N. line of Sect. No. 3, a cor. stake, from which a pine brs. S. 55° W. 6 vrs. and a pine brs. N. 58° E. 8 vrs. Thence E., at 1,083 vrs. N. E. cor. Sect. No. 3 and N. W. cor. Sect. No. 1, and at 1,678 vrs. place of beginning. Bearings marked "X." Surveyed August 4th, 1874.

"M. L. McAlister, Dept. Surveyor T. Co.

"W. Coopwood,
"R. Dell,
"Chainmen."

On August 3, 1874, McAlister surveyed sections 1 and 2 adjoining on the south and east, and on the 4th and following day sections 3 and 5 adjoining on the south and west, and on the 5th of August he surveyed section 6, lying immediately west of section 5. Of course,

*Rehearing denied May 20, 1907.

Digitized by Google

these sections were surveyed and located with reference to each other, and sections 6, 5, and 4 had the same north header line, to wit, a line due east from the extreme eastern corner of the B. Smart survey. Some of the field notes of the survey of section 4, particularly as to distances, are in conflict; but according to the undisputed evidence in the case the southeast corner, south line, southwest corner, west line, northwest corner, and north line were measured and established on the ground, and the landmarks are there. The east line may have been surveyed on the ground, but that line is controlled by older surveys, and there is a probability that it was laid off as to course and distance from data in the office of the surveyor.

The section as surveyed calls for square corners, the courses are all north and south, east and west, and the angles are all right angles, so that we may infer that the length north and south of the east line was intended to be the same as in the west line. The west line is given as 2,152 varas, and the north and south distance of the east line, made up of 1,312 varas to the south line of the Crews survey and 1,150 varas from southwest corner of Crews survey to the Tarver survey, amounting to 2,462 varas, is exactly 310 varas longer than the west line as given in the field notes, and 310 varas is the exact distance given in the first call south, and this call makes the trouble in the case. The actual distance from the conceded southeast corner of section 4 to the Crews survey, as shown by subsequent survey is 977 varas. Therefore the first mistake in the field notes is in the first call for distance north on west line of section No. 2, at 1,312 varas south line of Crews survey, which was too much over by some 300 varas; and it is fair to presume that, if this mistake had not been made, the call from Tarver's southwest corner south at 310 varas would not have been given in the field notes.

April 30, 1903, the deputy county surveyor of Tyler county, Tex., made a resurvey of section 4, and his corrected field notes are as follows:

"Beginning at the S. W. corner of section No. 2, B. B. B. & C. Ry. Co., on the N. line of section No. 1 of the B. B. B. & C. Ry. Co., a stake, from which a line brs. N. 6 vrs. Thence W., on N. line of section 1 and 3, 1,566 vrs., a stake, from which a pine brs. N. 58° E. 8 vrs., a pine brs. S. 36° 30′ E. 6¾. Thence N. 43′ W. on old marked line 2,232 vrs., the same being the E. line of section No. 5, B. B. B. & C. Ry. Co., a stake, from which a sweet gum brs. S. 12° E. 5 vrs., a pine brs. S. 45° E. 3 vrs. (These bearings have original marks and are the bearing trees called for in original notes of this survey.) Thence E. 975 vrs., C. C. Tarver's W. line, a stake, from which a black gum, with old corner marks and the letters 'R. R.' or 'R. B.' on it, brs. N. 12° E. 5 vrs. (This corner stands on the N. bank of McGraw's creek.) Thence S., with Tarver's west line, 102 vrs., S. W. corner of same, a stake, from which a pine (with old mark called for in original notes) brs. N. 15° W. 6 vrs. The red oak called for in notes is gone, but a portion of the stump remains, and brs. S. 35° E. 5 vrs. Thence E., with Tarver's S. line, 457 vrs., John Crews' W. line fell in field 20 vrs. S. of Crews' N. W. corner (corner obliterated). Set stake for this corner. Thence S., with Crews' W. line, from his N. W. corner, 1,150 vrs., his S. W. corner, a stake, from which a pine brs. S. 66° W. 8 vrs., another pine called for in old notes gone, marked a sweet gum 12 inches in dia. brs. S. 30° E. 13 vrs. Thence E. 162 vrs., rock corner on said Crews' S. line. and the most western N. W. corner of section No. 2. Thence S., with the W. line of section No. 29. 77 vrs., to the place of beginning. Bearings marked 'X.' Surveyed April 30th, 1903."

Digitized by Google

To the survey is attached the following certificate:

"I, M. L. McAlister, surveyor Tyler county, Texas, do hereby certify that I have examined the plat and field notes of the above survey and find them correct, and that they are recorded in my office in Book 1 of Transcript from old R. R. Book E., pages 142 and 143.

"Given under my hand, at Woodville, on the 2d day of May, 1903.

"M. L. McAlister, County Surveyor, Tyler Co., Texas."

We take it that the M. L. McAlister making the above certificate is the same M. L. McAlister who, as deputy surveyor of Tyler county, made the original survey August 4, 1874.

It is objected that these corrected field notes cannot be considered, because the calls are not followed as in the original survey, but are reversed. There have been some conflicting decisions in regard to the right to reverse the calls in surveys not proved to have been made upon the ground; but we think that in cases of conflicting boundary, where the proof goes to the extent of showing that part of the survey was on the ground, the calls may be reversed, and the lines traced the other way, "whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant." See Platt v. Vermillion, 99 Fed. 356, 39 C. C. A. 555, where the matter of reversing calls in a survey is fully discussed and authorities considered. In these corrected field notes the north line is from the northwest corner of section 4, "E. 975 vrs., C. C. Tarver's W. line, a stake, from which a black gum, with old corner marks and the letters 'R. R.' or 'R. B.' on it, brs. N. 12° E. 5 vrs." We understand this to be the same line claimed by the appellants and shown to have been run on the ground in the original survey, and we conclude, from this and the other facts proved, that this line is the north line of section 4.

The court below, following the master, having rejected this line and found the north line of section 4 to be further south by some 400 varas, we are constrained to reverse the decree of the court below and remand the case, with instructions to sustain the exceptions to the master's report so far as to hold that the north line of section 4 is a line running due east from the northwest corner of section 4 to the Tarver survey, as given in the corrected field notes of the survey in April, 1903, and thereupon to decree in favor of the interveners for the sum of $2,210.41, with interest from June 1, 1903, the value of timber belonging to the interveners and cut by the Kirby Lumber Company, as shown by facts given in the master's report.

And it is so ordered.

(152 Fed. 624.)

ST. LOUIS SOUTHWESTERN RY. CO. v. WAINWRIGHT.

(Circuit Court of Appeals, Eighth Circuit. March 11, 1907.)

No. 2,385.

1. CARRIERS—INJURY TO PASSENGERS—PREMATURE STARTING OF TRAIN—QUESTION FOR JURY.

In an action against a railroad company to recover for a personal injury, the evidence was conflicting, but in one aspect tended to show that, while a vestibuled train of defendant was stopped to let off and take on passengers at a station platform where there was no depot or agent, plain-

Digitized by Google

tiff, after waiting until passengers came out, as required by defendant's rules, immediately started to go up the steps while the train was yet stationary and the vestibule doors open, intending and prepared to pay his fare and become a passenger; that, as he placed one foot on the step, the train suddenly started, and his other foot struck against a pile of freight on the platform in close proximity to the cars, and he was dragged from the steps under the car and injured. *Held*, that such evidence, if believed, warranted a finding that plaintiff was intending to take passage on the train, in which case he was entitled to the same protection as an accepted passenger and to a reasonable time to enter after the other passengers had alighted; that he acted with due care, and his injury was due solely to the negligence of defendant's servants in starting the train before he could do so; and that therefore it was not error to refuse to direct a verdict for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1322. Who are passengers, see note to Chamberlain v. Pierson, 31 C. C. A. 164.]

2. WRIT OF ERROR—REVIEW—DISCRETION OF COURT—RULING ON MOTION FOR NEW TRIAL.

A motion for a new trial in a federal court is addressed to the sound discretion of the court, and its ruling thereon cannot be assigned as error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860–3876.]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

J. C. Hawthorne (S. H. West, on the brief), for plaintiff in error.

J. W. House (H. A. Parker and M. House, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This was an action to recover for injuries sustained by the plaintiff below while he was in the act of entering a passenger train of the railway company at Keevil, Ark., with the purpose of becoming a passenger. The negligence charged against the defendant was that freight was piled upon the station platform too near the track, that the train was not stopped long enough to permit intending passengers to enter in safety, and that after the plaintiff had placed one foot upon the steps to the car, and when he was lifting the other thereto, the train was suddenly started, and he was quickly carried against the freight upon the platform, and was thereby pulled off the steps and thrown under the train. In its answer the defendant denied that the plaintiff intended to become a passenger, and that it was guilty of any of the negligence charged, and alleged that the plaintiff's injuries were occasioned by his own negligence. The trial resulted in a verdict and judgment for the plaintiff.

Complaint is made of the court's refusal to direct a verdict for the defendant. The evidence was conflicting, and, in one view, tended persuasively to show these facts: The train in question was a vestibule passenger train and stopped at Keevil to let off and take on passengers. There was no depot or agent there, and a portion of the platform had become incumbered by freight which was piled thereon to within 17

Digitized by Google

inches of the train and to a height of 4 feet. After the train came to a stop, the plaintiff presented himself on the platform, at the place where the vestibule doors were open and passengers were alighting. He intended to take passage to a near-by station, at which the train regularly stopped, and was prepared and expected to pay his fare. A rule of the defendant, of which he had knowledge, forbade intending passengers to enter until after those who were debarking had alighted. Immediately after the passengers for that station had alighted, and while the train was yet stationary and the vestibule doors open, he took hold of the handrails, placed one foot upon the steps to the car, and was in the act of raising his other foot thereto, when the train suddenly started, and the foot which he was raising was quickly carried against the projecting pile of freight, whereby he was pulled off the steps, thrown under the train, and sustained severe injuries. The trainmen did not observe that he was intending or attempting to enter the train, but they could readily have done so had they been attentive to their duties. As before stated, the evidence was conflicting; but, putting upon it the construction most favorable to the plaintiff, as must be done in considering the present complaint, we think it amply justified the jury in finding that the plaintiff intended to take passage upon the defendant's train and presented himself in the proper place, at the proper time, and in a proper manner to do so; that he was impliedly invited to enter the train as a passenger, and was impliedly assured that he would have a reasonable time in which to do so after those who were debarking had alighted; that he was acting upon this invitation and assurance and was proceeding with reasonable prudence and promptness when the train was started; that the defendant was negligent in the respects charged, and that its negligence was the proximate and sole cause of the plaintiff's injuries. And as, upon such a state of facts, he would plainly be entitled to recover, in like manner as if he had been expressly accepted as a passenger, the request for a directed verdict was rightly denied. Hutchinson on Carriers (3d Ed.) §§ 1005, 1111; 4 Elliott on Railroads, § 1628; 5 Am. and Eng. Enc. (2d Ed.) 488, 576; 6 Cyc. 538, 612; Cohen v. West Chicago St. Ry. Co., 9 C. C. A. 223, 60 Fed. 698; Texas & Pacific Ry. Co. v. Gardner, 52 C. C. A. 142, 114 Fed. 186; Washington, etc., Co. v. Patterson, 9 App. D. C. 423; Smith v. St. Paul City Ry. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; Curtis v. Detroit & Milwaukee R. R. Co., 27 Wis. 158, 168; Webster v. Fitchburg R. R. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; Cleveland, etc., Co. v. Wade, 18 Ind. App. 346, 48 N. E. 12; Western & A. Ry. Co. v. Voils, 98 Ga. 446, 26 S. E. 4[illegible], 35 L. R. A. 655; St. Louis Southwestern Ry. Co. v. Cannon (Tex. Civ. App.) 81 S. W. 778; Hatch v. Ry. Co., 212 Pa. 29, 61 Atl. 480.

Complaint is also made of the denial of a motion for a new trial, but it has long been settled that in the federal courts such a motion is addressed to the sound discretion of the court, and that the ruling thereon cannot be assigned as error. Southern Pacific Ry. Co. v. Maloney, 69 C. C. A. 83, 136 Fed. 171; City of Manning v. German Ins. Co., 46 C. C. A. 144, 107 Fed. 52; Van Stone v. Stilwell & Bierce

Digitized by Google

Mfg. Co., 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085.

No error being disclosed by the record, the judgment is affirmed.

(152 Fed. 627.)

SASS & CRAWFORD v. THOMAS et al.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1907.)

No. 2,393.

LANDLORD AND TENANT—REPUDIATION OF TENANCY—DENIAL OF TITLE—UNLAWFUL DETAINER—TIME TO SUE.

Where tenants repudiate their tenancy, deny the title of their landlord and assert title in themselves, the landlord is entitled to commence and maintain an action of unlawful detainer, without awaiting the expiration of the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 336, 1209.]

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 89 S. W. 656.

Minnie Thomas and her husband sued Sass & Crawford in unlawful detainer for the possession of real property in Ardmore, I. T. It was averred in the complaint that Mrs. Thomas, being the owner of the property, had executed a lease for a three years' term to a firm by the name of Munzesheimer & Daub; that defendants acquired the leasehold interest and became her tenants; that the term had expired and that defendants refused to surrender possession after due notice; also, that in the month preceding the commencement of the action the defendants denied the title of Mrs. Thomas, and repudiated any tenancy by setting up in an injunction suit which they instituted against her that before the making of the lease she had given a quitclaim deed, and that her title was thereby devested and had passed to defendants.

The defendants, in answering, denied the making of the particular lease described in the complaint, but averred that the lease she did make and under which they claimed was for a longer term which had not expired, and that they had tendered the rent and were lawfully in possession. They admitted in their answer that in the injunction suit referred to they had denied her title, had asserted title in themselves, and had endeavored to substantiate the same by evidence. They sought to excuse this repudiation of their tenancy by averring that in their injunction suit they also relied upon the lease, and that their assertion of title in themselves was to show "that in any event" they were entitled to possession and to prevent Mrs. Thomas from trespassing. There was no reply to the answer. Under the laws of Arkansas in force in this particular in the Indian Territory averments of new matter in an answer not amounting to a counterclaim or set-off are considered as denied without reply. Mansfield's Dig. §§ 5025, 5043 [Ind. T. Ann. St. 1899, §§ 3230, 3248].

At the trial it was shown conclusively, and without contradiction, that defendants' predecessors went into possession as tenants of Mrs. Thomas under the three years' lease described in her complaint, and that soon afterwards, and whilst she was confined to her bed by illness, they obtained her signature to the lease for the longer term set up in the answer by falsely and fraudulently representing to her that it was the same as the one first executed excepting as to the joinder therein of her first husband, who had recently died. The verdict of the jury and the judgment of the trial court were for Mrs. Thomas. The judgment was affirmed by the Court of Appeals in the Indian Territory (89 S. W. 656), and this writ of error was prosecuted. As to the history of this case, see Sass v. Thomas, 64 S. W. 528, 3 Ind. T. 536, and 69 S. W. 893, 4 Ind. T. 336, and of the injunction suit of Sass & Craw-

Digitized by Google

ford, see Thomas v. Sass, 64 S. W. 531, 3 Ind. T. 545, and 69 S. W. 894, 4 Ind. T. 336.

Ledbetter & Bledsoe, for plaintiffs in error.

W. I. Cruce and A. C. Cruce, for defendants in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

If a tenant repudiate his tenancy, deny the title of his landlord, and assert title in himself, may the landlord at once commence and maintain an action in unlawful detainer without awaiting the expiration of the term of the lease? In Willison v. Watkins, 3 Pet. (U. S.) 42, 7 L. Ed. 596, it was held that, when a tenant repudiates his tenure and claims adversely to his landlord, his term at once comes to an end; that his possession is then as much the subject of action by the landlord as a possession originally acquired by wrong; that the relation of landlord and tenant is dissolved and each party is thenceforth to stand upon his own right. Though that was a case of trespass to try title in which it appeared that the statute of limitations had run against the landlord after the repudiation by the tenant, the principle declared is fully applicable to the case at bar. There is nothing exceptional or peculiar about the relation existing between landlord and tenant that prevents them from putting an end to it at any time though the term originally fixed may still endure. The legal consequences of acts committed are as effectual for that purpose as the formal convention of the parties. When one having obtained possession as a tenant disclaims holding as such and denies the title of his landlord, he has broken the tenure and his term has come to an end. It is then his duty to surrender the property, and, failing to do so, the remedy of the landlord to sue in unlawful detainer is as available as it would be in case of holding over after the natural expiration of the contract term. Tobin v. Young, 124 Ind. 507, 24 N. E. 121; Buckner v. Warren, 41 Ark. 532; Barnewell v. Stephens, 38 So. 662, 142 Ala. 609; Fusselman v. Worthington, 14 Ill. 135; Wall v. Goodenough, 16 Ill. 415; Doty v. Burdick, 83 Ill. 473; Douglass v. Anderson, 32 Kan. 353, 4 Pac. 283. That Sass & Crawford disclaimed the tenancy, denied the title of Mrs. Thomas, and asserted title in themselves stood admitted upon the face of the complaint and answer. There being no issue raised, no evidence concerning the matter was necessary and judgment could well have followed upon the pleadings.

Another question was presented and elaborately argued. When a defendant in an action at law puts forward as a defense a written instrument executed by the plaintiff, may the latter overthrow it by proof that his signature was obtained by false and fraudulent representations as to the character of the instrument, though there is no averment thereof in his complaint? In other words, may the attack upon the writing executed under such circumstances be deferred until rights are asserted under it in an action at law, or must the aid of a court of equity be sought for its cancellation?

The conclusion reached upon the other feature of the case is sufficient for its disposition.

The judgment is affirmed.

Digitized by Google

(152 Fed. 673.)

THE WILLIAM E. REIS. THE JOHN W. MOORE. THE FANNY NEIL. THE JAMES B. EADS.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1907.)

Nos. 1,606–1,608.

1. COLLISION—VESSEL BREAKING FROM MOORINGS—NEGLIGENT INATTENTION TO LINES DURING FLOOD.

The William E. Reis, a large modern steamship, having on board 4,800 tons of iron ore, which lay moored for the winter at a dock in the Cuyahoga river, at Cleveland, broke from her moorings by reason of the parting of her lines during a flood following a heavy thaw, with rain, and drifted against and injured other vessels moored below. The river had been rising for two or three days, and due warning of the approaching flood had been given by the press. Only one person was kept on board as shipkeeper, and he was unable alone to manipulate the lines to equalize the strain thereon as the vessel was lifted by the rising water, and the evidence tended to show that the lines broke because of the unequal strain thereon. There were 50 other vessels moored in the river, none of which broke loose. *Held*, that such facts did not sustain the burden of proof resting on the vessel to show affirmatively that her drifting was the result of inevitable accident, or a vis major, which human precaution and a proper exercise of nautical skill could not have prevented, but that, whether or not her fastenings were originally sufficient, they ceased to be so when the flood came, especially in view of her great weight, and the failure to take precautions to make and keep them so rendered her liable for the resulting damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 85½.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio.

For opinion below, see 143 Fed. 1013.

H. D. Goulder and F. L. Leckie, for appellant.

R. M. Lee, for the John W. Moore and the Fanny Neil.

G. W. Cottrell, for the James B. Eads.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. About 8 o'clock on the morning of January 22, 1904, the William E. Reis, a large modern steamship, which lay moored for the winter at the River Furnace dock, a short distance above the Columbus Street Bridge, in Cleveland, broke from her moorings during a freshet or flood following a heavy thaw, with rain, and drifted down the Cuyahoga river in a current of four or five miles an hour. A short distance beyond this bridge she struck and slightly damaged the barge Fanny Neil, then struck and broke adrift the steam propeller John W. Moore, which in turn struck and broke adrift the steam propeller John B. Eads, and the Reis, with the Moore and the Eads, drifted down the river till they brought up against the Superior Street Viaduct, where the Moore was sunk and the Eads badly damaged.

In the libels a number of faults were charged against the Reis, among others the lack of sufficient winter moorings, a failure to take proper precautions to prevent her going adrift in the rising flood, and the neglect to place her in charge of a competent and careful shipkeeper,

Digitized by Google

with authority to call for help, who could and would oversee her fastenings, and make such alterations and adjustments as the changing conditions resulting from the rising river should from time to time demand. The answer of the Reis set up "inevitable accident," alleging that her moorings when she was tied up were proper and sufficient under all the conditions that might then have been reasonably anticipated, that she was provided with a proper and suitable shipkeeper, and that she broke away because of an unprecedented flood, which put her fastenings under a strain which was not anticipated and could not be provided against. The court below rendered a decree in favor of the libelants, but placed it upon the ground that the Reis and her owners were at fault in not manipulating her moorings and in not loosening or tightening her lines and cables in a proper and seamanlike manner during the critical hours of the rising flood immediately preceding the accident.

As to the character of the original moorings, the court expressed the view that there was great conflict in the testimony; but, giving full weight to it all, it would appear that the fastenings were such as would satisfy a prudent navigator that they were sufficient, if kept in proper adjustment, to repel the force of any flood reasonably to be apprehended. The court did not go further into this conflict, placing its opinion, as we have indicated, upon the neglect of the Reis to keep the fastenings in the proper adjustment during the critical period of the flood. The Reis was 436 feet long over all, 50 feet beam, and 28 feet depth. She came to the River Furnace dock laden with about 6,500 tons of iron ore, and before she broke away about 1,800 tons had been removed, so that at the time she went adrift she had about 4,800 tons of ore on board. Her master and crew left her about December 12, 1903, leaving her in charge of one Coyne as shipkeeper. Coyne was a young man about 20 years old. He had sailed about 5 years as an oiler, watchman, and second cook. The fastenings which held the Reis to the dock were described by her captain, and as stated in the opinion of the court below they were as follows:

"An 8-inch manila line, leading ahead some 30 feet from her forward starboard tow chock, to a pile on the dock. The first fastening abaft of this was six parts of a 6-inch manila line, leading from the breast chock in the windlass room to the dock timbers on the dock; three of these parts leading quartering ahead, and three parts about 45 degrees forward of abeam. From her forward deck engine, a short distance abaft of her forward house, she had a ⅞-inch steel cable leading ahead and one astern; also three parts of a 6-inch manila line leading ahead. From her amidships timberhead, abreast of her amidships deck engine, she had a ¾-inch wire cable leading ahead. From her after deck engine, she had a ⅞-inch steel cable leading ahead, and another one astern; and from the same chock she had two parts of a 6-inch line leading ahead. From the after chock she had three parts of a 6-inch line, two leading ahead and one leading astern. These lines were all made fast to dock timbers and piles on the dock; and, where bights were put out, these were fastened around dock timbers with toggles. The lines had various leads, some short and some long; but it is impossible, from the testimony, to give their definite length."

There are some discrepancies between this statement and the fastenings given in the answers; the principal one, it seems to us, growing out of the different location of the vessel. According to the captain, when the vessel was first tied up, she was against the dock, both for-

Digitized by Google

ward and aft, but away from the dock amidships some 10 feet, because of a bend in the dock. On Thursday, before she broke away, she was substantially against the dock aft, but her straight side forward was away from the dock from 8 to 10 or 12 feet. It was a matter of doubt as to what caused this, whether a shoal place near the dock or the presence of some obstruction. At any rate, after the rise came Thursday night, the vessel cleared the obstruction, whatever it was, and, before she broke away, came up close so she was against the dock forward.

It appears from the testimony that there was an unusual covering of snow and ice, with cold and freezing weather, up to January 19th, when the temperature arose to 40 degrees above. It began to rain heavily and thaw from that time till the 22d. The river began to rise during Wednesday night. The ice broke up, and the snow melted and disappeared Wednesday. During Thursday the water arose rapidly, until by 4 or 5 o'clock that afternoon, it had arisen to a height of 2 or 3 feet at the River Furnace dock, where the Reis lay. By this time the press had given information of the threatening conditions, and extra precautions were being taken by those in charge of vessels moored in the river. An examination of the fastenings of the Reis was made by several masters of what is called the "Corrigan Fleet," some of which lay close below, and they testified that in their opinion the fastenings were sufficient, in view of the conditions then existing and to be expected. It appears that there was a so-called shore captain of the Reis, who lived aboard another vessel some distance away. He came to see the Reis on Wednesday, two days before she broke away. He satisfied himself that she was all right, went back to his comfortable quarters, and stayed there until he heard that the Reis and her victims had brought up against the viaduct bridge. So that the responsibility for handling the Reis during Thursday night, when the flood was really on rested upon the shipkeeper, Coyne. Coyne was on board with a friend of his, who was not a sailor man, so the entire work in the management of the fastenings was left to Coyne.

Coyne testified that his attention to the rise in the river was first called by the strain upon the lines, which he noticed Thursday night, some time between 9 and 12 o'clock. The vessel then came up forward closer to the dock than she had been. Coyne then went back and found the strain on the aft breast line; "more strain on that than the others," so eased that off a little. That was the first line he surged. The line was made fast to the timberheads on the starboard side. He slacked it probably some inches. It might have been less than a foot; it might have been more. He could not say. This was probably between 10 and 12 o'clock at night. The next thing he did was to slack the cable amidships leading ahead. He "slacked that wire next." He took a couple of turns off, and slacked it away a little. He took the turns off the timberheads. After he slacked the cables, he did not do anything for a couple of hours. After midnight he went forward and slacked away the 8-inch line. That was after 1 or 2 o'clock in the morning. He probably slacked that 6 or 8 inches. Then he found that the lines were all about on an equal strain as near as possible, and he went back to get something to eat. This was the extent of the manipu-

Digitized by Google

lation of the fastenings by Coyne. When the Reis broke away, no dock timber or pile, and no part of the dock, broke or gave way, and no timberhead or other fastening on the Reis broke or gave way, but the lines and the cables on the Reis parted. It appears that as the water rose the forward part of the Reis went in tight against the dock. As a result the stern was forced out, the strain upon the lines aft became so great that they parted, the stern swung out into the river, and then practically immediately the boat went adrift.

But it is contended that since the shipkeeper was as good a man as is usually employed in that position, and since he did all he could, and nevertheless the boat went adrift, it was not his fault, or that of the owners, and must be charged up to inevitable accident. If we believed that under the circumstances, the owners ought not to have anticipated any difficulty in manipulating the fastenings of this vessel which Coyne would not be able to cope with, then we should concede the strength of the argument. But this was not the ordinary case. It does appear in the testimony that usually one shipkeeper alone would be employed for a vessel, and sometimes, not even one. Not infrequently one man would take care of a number of vessels. But these were all vessels which had been unloaded, and were tied up securely, so that it was not necessary to do more than guard them against thieves, and give warning of any unexpected conditions requiring additional aid to care for the vessel. In the present case, however, three-fourths of the cargo was still aboard. The vessel was tied up with ropes and cables. At first she was against the dock both forward and aft. Later, at the time the flood began, her position for some reason had been shifted, and she was from 8 to 12 feet away from the dock forward. She was an unusually large vessel, carrying a heavy cargo, that must have put an enormous strain upon her fastenings. Under these circumstances, ordinary care required the exercise of constant vigilance in order to keep the moorings properly adjusted and the strains equalized. The heavy current tended to alter the position of the vessel, and the strains thus caused were heightened and complicated by those due to the rise in the water. The weight of the testimony was to the effect that under the existing conditions one man could not handle the fastenings of the Reis. It required five or six. If it required five or six, then it was the duty of the Reis and her owners to provide that many. Sufficient warning was given, and there was no justification for running the risk of allowing a large vessel like this to run amuck where 50 or more were safely moored, yet liable to be cut down and sunk in case of disaster.

This case involves no new doctrine. The rule applicable is stated in The Louisiana, 3 Wall. 164, 18 L. Ed. 85, as follows:

> "The collision being caused by the Louisiana drifting from her moorings, she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a vis major which human skill or precaution and a proper display of nautical skill could not have prevented."

Whether the moorings of the Reis were originally sufficient or not, they certainly ceased to be so when the high water came, and there was no one on board who could and did adjust them so as to relieve them from the unusual and heavy strains to which they were then

Digitized by Google

subjected. The other shipkeepers either moored their vessels better, or they knew better how to care for their fastenings under a strain; for, of the 50 there, the Reis was the only one that broke loose and went adrift. We think the fault was with the Reis. If she had been made secure, she could have been kept secure by proper attention. She was neglected at a critical time, with the usual result.

The judgments are affirmed.

(152 Fed. 677.)

MEMPHIS CONSOL. GAS & ELECTRIC CO. v. BELL.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1907.)

No. 1,621.

ELECTRICITY—NEGLIGENCE—ACTION FOR INJURY FROM ELECTRIC LIGHT WIRE—QUESTIONS FOR JURY.

Plaintiff's intestate, who was a lineman in the employ of a telegraph company, while stringing wire on a pole, received a severe electric shock which caused him to fall, resulting in his death. The pole also carried telephone wires, one of which was grounded, and two high current electric wires of defendant. These wires were placed next the pole on each side, about 18 inches apart, and one was spliced near the pole, and at such splice the insulating tape had worn or burned away, leaving the wire exposed, but the absence of insulation was not noticeable without close inspection. The deceased was an experienced lineman, and was familiar with the pole and the wires thereon. No one saw the accident, but there was evidence tending to show that the shoulder of deceased came in contact with the exposed part of the electric light wire while his foot was touching the grounded telephone wire which was some five feet below. *Held* that, in view of the fact that defendant was required to insulate its wires and attempted to do so, the question of its negligence in placing the wires so near together, and in failing to properly inspect the same so as to keep the insulation in a reasonably safe condition, where it was known that linemen were liable to come in contact with them, was for the jury, as also the question of the contributory negligence of the deceased; there being no evidence that he knew the wire was not properly insulated, and did not rely on its being so insulated, as he had reasonable grounds to do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, §§ 7-11.]

In Error to the Circuit Court of the United States for the Western District of Tennessee.

E. E. Wright and Edwin Hedrick, Jr., for plaintiff.

E. G. Bell, for defendant.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit to recover damages for personal injuries resulting in the death of the plaintiff's intestate, D. L. Brooks, a lineman in the employ of the Western Union Telegraph Company at Memphis. This company and the Cumberland Telephone & Telegraph Company were originally joined as codefendants, but during the first trial the suit was dismissed as to them.

The original declaration contained a general charge of negligence against all three companies, and in addition a charge that the present defendant, the Memphis Consolidated Gas & Electric Company, had

Digitized by Google

negligently failed to properly insulate its wires where it was known the plaintiff's intestate and other linemen of the Western Union Telegraph Company were compelled to work, and that it negligently failed to inspect its wires so as to keep them in a reasonably safe condition. The case was twice tried, and during the second trial the plaintiff was permitted to amend his declaration by alleging that the defendant negligently failed to properly construct its wires upon the pole from which the plaintiff's intestate fell, and placed its high tension wires too close together, "the said negligent construction and maintenance consisting in placing said high tension wires eighteen inches apart." As already indicated, the case has been twice tried, the court setting aside the first verdict, because not satisfied the plaintiff was entitled to recover, and sustaining the second, although still indicating the impression that it should have withdrawn the case from the jury. In other words, the court was unable, after sitting through two trials, to satisfy itself upon the point whether the case was or was not one for the jury. The court indicates, however, in its final word that it is disposed to think that in this circuit perhaps a more stringent rule than obtains elsewhere has been established with respect to companies using dangerous currents of electricity upon wires strung in the streets.

It is now contended that the court should have directed a verdict for the defendant on the ground that the testimony not only failed to sustain the charge of negligence, but made out a clear case of contributory negligence. On August 3, 1905, D. L. Brooks was employed by the Western Union Telegraph Company. He was an experienced lineman, having been so engaged for several years, and was familiar with the pole on the corner of Main and Calhoun streets, in Memphis, on which were strung not only the telegraph wires of the Western Union Telegraph Company, but also the telephone wires of the Cumberland Telephone & Telegraph Company, and, on the lower crossarm, the electric light wires of the defendant, the Memphis Consolidated Gas & Electric Company. The pole stood between two inside parallel electric light wires of the electric company, located about 18 inches apart. About four feet below the crossarm which carried the electric light wires was a messenger wire of the Cumberland Telephone & Telegraph Company, which was "grounded," and this fact was known to Brooks. The inside electric light wire west of the pole was fastened together by a splice at a point about 18 inches north of and perpendicular to the crossarm. The distance from this joint in the electric light wire to the nearest point of the messenger wire leading out from the pole on its west was about five feet. On the day mentioned Brooks was ordered to string some wires for the Western Union Telegraph Company on this pole. While engaged in this work, he received a severe shock of electricity and fell from the pole to the pavement, receiving injuries from which he died within a few hours. No witness saw him fall. An examination of his person showed that he had been burned in two places, on the left foot and right shoulder. These are the points of his body which would naturally have come in contact—the first with the grounded messenger wire, and the second with the electric light wire at the point where it was spliced. An

Digitized by Google

examination of this splice disclosed the fact that the tape had become worn and weather-beaten and, at the point where Brooks' shoulder touched it, there was no insulation. The current of electricity had burned away the tape which remained, so the wire at this point was bare. There was testimony which showed that Brooks had been warned about these electric light wires and all similar wires; that they were dangerous, and, whether insulated or not, they should be treated as live wires. These were high tension wires, carrying a voltage of from 2,000 to 2,300 volts, an electric current dangerous to life.

The negligence charged against the defendant was in placing these high tension wires too close together on the pole, and in not properly insulating the same, and in failing to inspect them so as to keep them in a reasonably safe condition. According to the testimony, the high tension wire which was spliced and not properly insulated, and from which Brooks received the shock which resulted in his death, was not located more than 18 inches from the next high tension wire on that crossarm, and the pole was between. We think that the question was properly left to the jury as to whether the company was not negligent in placing these wires in such dangerous proximity. The testimony further showed that the high tension wire in question was not properly insulated at the splice or joint. But it is said that the lack of insulation at this point could not have affected injuriously the plaintiff's intestate, because it is impossible to effectively insulate a high tension wire of this character, and the deceased was instructed to treat all such wires as live wires, just as if no attempt had been made to insulate them. But, in view of the fact that such wires are required to be insulated, and that an attempt in this case was made to insulate the particular wire, and to all appearance it was insulated, and especially since it conclusively appears from the burns received by the plaintiff's intestate that the deadly current did actually pass through the joint or splice where the insulation had worn off, we think the court properly left it to the jury to say whether the defendant was not wanting in proper and ordinary care in placing these high tension wires so close together, and in permitting one of them to become uninsulated at the very point where the lineman was liable to brush against it in ascending the pole.

We next come to the question whether the court was justified in leaving the matter of contributory negligence to the jury. There was some testimony tending to show that the lineman, Brooks, on ascending the pole, could have observed, if he had kept his eyes open, that the electric light wire was exposed at the joint or splice and therefore was not properly insulated, but we think it was a question for the jury, since the testimony upon this point was conflicting, as to whether the lack of insulation could be observed by the lineman while ascending the pole. It is certain that after the accident a special examination had to be made in order to discover the extent to which the insulation was worn off, and to thoroughly satisfy himself on that point, the city electrician placed his finger upon the wire where the insulating tape appeared to be weather worn, and thus allowed himself to be slightly shocked and burned. In taking this view, of course, we re-

Digitized by Google

iterate the position taken with respect to the question whether the negligence of the defendant was properly left to the jury, that whether the high tension wire was insulated or not must not be regarded as unimportant, as if the company were under no obligation to keep such wires insulated, and linemen had no right to act upon the supposition that they were insulated. While it may be difficult to insulate high tension wires, and to keep them insulated under all circumstances, we think in cases like the present, where such wires are strung on the poles along with low tension wires, requiring frequent attention and repairs by the linemen of telegraph and telephone companies, the tendency of the courts is to hold that ordinary care and prudence requires their insulation to be maintained by reasonable inspection and repair, and by the usual methods adopted for such purposes. Memphis Con. Gas & Elec. Co. v. Letson, 135 Fed. 969, 68 C. C. A. 453.

The strongest point urged against a recovery in this case is that it appears from the burns found upon the body of the plaintiff's intestate that he was in contact with the grounded messenger wire at the time he touched the uninsulated electric light wire, and thus received the current which caused his fall. No one saw lineman Brooks climb the pole and no one saw him when he fell, and his location when he received the current is a matter of inference. The burn through his shirt and on his shoulder indicates that that portion of his body was in contact with the electric light wire where the insulation had worn off near the joint or splice, while the burn on his foot, although on the upper and not the lower part, indicates, so the witnesses say, that the foot was on the grounded wire, but that the current of electricity in passing out of the foot went through the upper part of the shoe, instead of the lower, because there was less obstruction there, the sole of the shoe acting as a resistant to the current. We must concede, however, that if Brooks put himself in contact with the grounded wire, and then touched the uninsulated electric wire, knowing it to be uninsulated, he was guilty of contributory negligence, for he knowingly and unnecessarily put himself in a position of great peril. Williams v. Choctaw, etc., Ry. (C. C. A.) 149 Fed. 104.[1] And this is true if he knew that by touching the electric light wire, whether insulated or not, while standing upon or in contact with the grounded wire, he would expose himself to a dangerous current of electricity. In either event, if the proof upon these questions was conclusive, the court should have directed a verdict for the defendant upon the ground of contributory negligence. The question narrows itself to this: Whether, although the electric light wire was apparently insulated, the deceased, while in contact with the grounded wire, was as a matter of law guilty of negligence in permitting himself to come in contact with it. In other words, ought the jury to have been permitted to pass upon the question whether the deceased was negligent in permitting himself to come in contact with the electric light wire under the circumstances? While the question involved is a close one, and the court naturally remained in doubt as to the correctness of its conclusion until the end, we think the decision was a correct one. The matter was properly left with the jury. It is not to be assumed that Brooks intended to

[1] 79 C. C. A. 146.

Digitized by Google

commit suicide. The natural inference is that he relied, and had reasonable grounds to rely, on the insulation of the electric light wire when he attempted to pass by it while in contact with the grounded messenger wire. Whether he did so rely, and whether he had good reason to, and whether under the circumstances he was or was not guilty of negligence, were, in our opinion, questions which the court, under pertinent instructions, properly left for the jury to decide.

Judgment affirmed.

(152 Fed. 681.)

STANDARD OIL CO. v. PARKINSON.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1907.)

No. 2,461.

1. MASTER AND SERVANT—TORTS OF SERVANT—LIABILITY OF MASTER—TEST.

The test of one's liability for the negligent act or omission of his alleged servant is his right and power to command and control his imputed agent in the performance of the causal act or omission at the very instant of its performance or neglect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1209, 1226.]

2. SAME—SCOPE OF EMPLOYMENT.

A master is liable for damages caused by the negligence of his servant within the scope and in the course of his employment, although he neither directs nor is aware of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1226.]

3. SAME—ACTION—QUESTION FOR JURY.

One Perry was intrusted with the keys of the storage tanks of the Standard Oil Company at a town in Nebraska, drew oil and gasoline from them, hauled and delivered these articles to customers of the company in neighboring towns, sold them when he could at prices fixed by the company, collected the prices of the articles delivered and sold, and remitted their proceeds weekly to the company, which paid him monthly one cent a gallon of the articles thus delivered and sold. He used a wagon of the company and his own horses and selected his own routes and times to haul the oil and gasoline, and, as he was driving across a railroad track, an engine collided with the wagon and a serious injury resulted.

Held, there was substantial evidence that Perry was the agent of the company at the instant and in the act of driving upon the railroad crossing, so that the question whether he was an agent or an independent contractor was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1274.]

4. DEATH—ACTIONS—PRESUMPTIONS.

In Nebraska the legal presumption is, in an action under sections 2503, 2504, Comp. St. Neb. 1901, for damages for the death of a person by the wrongful act of another, that the widow and children of the deceased person were dependent upon him for support and maintenance, and that they sustained pecuniary injuries by his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 77.]

5. SAME—ADMISSIBILITY OF EVIDENCE.

The legal presumption of the dependence of the wife and minor children upon the husband and father during his lifetime for support is rebuttable, not conclusive, and evidence by a plaintiff in support of it before she knows whether or not the defendant will present evidence to overcome it is neither incompetent nor immaterial.

(Syllabus by the Court.)

Digitized by Google

In Error to the Circuit Court of the United States for the District of Nebraska.

William D. McHugh (Alfred D. Eddy, on the brief), for plaintiff in error.

Ed. P. Smith (John J. Sullivan and C. J. Smyth, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. On October 27, 1904, J. D. Perry drove his team, attached to a wagon of the Standard Oil Company loaded with oil and gasoline, upon a crossing of the Chicago, Burlington & Quincy Railroad Company, where an engine of that corporation driven by John C. Parkinson collided with it. The gasoline and oil took fire and burned the engineer so that he died. Rosa Parkinson, his widow and the administratrix of his estate, brought this action against the oil company for causal negligence. She averred that Perry was one of the company's servants, that he negligently drove his team upon the crossing and thereby brought about the death of the engineer. The oil company denied these allegations, and the jury returned a verdict for the administratrix. At the close of the evidence the court denied the motion of the defendant to return a verdict in its favor, and this ruling is assigned as error, upon the ground that there was no substantial evidence in the case that Perry was the agent or employé of the oil company in the act of driving his team upon the railroad track at the time of the accident.

The test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent in the performance of the causal act or omission at the very instant of the act or neglect. There can be no recovery of a person for the act or omission of his alleged servant under the maxim, "respondeat superior," in the absence of the right and power in the former to command or direct the latter in the performance of the act or omission charged, because in such a case there is no superior to respond. Brady v. Chicago Great Western R. Co., 114 Fed. 100, 107, 52 C. C. A. 48, 55, 57 L. R. A. 712; Atwood v. Railway Co. (C. C.) 72 Fed. 447, 454, 455; Byrne v. Railroad Co., 9 C. C. A. 666, 61 Fed. 605, 608, 24 L. R. A. 693; Hilsdorf v. City of St. Louis, 45 Mo. 94, 98, 100 Am. Dec. 352; Town of Pawlet v. Rutland & W. R. Co., 28 Vt. 297, 300; Miller v. Railroad Co., 76 Iowa, 655, 659, 39 N. W. 188, 14 Am. St. Rep. 258; Wood, R. R. § 388; Donovan v. Construction Syndicate (1893) 1 Q. B. Div. 629; Rourke v. Colliery Co., 2 C. P. Div. 205. But a master is liable for damages caused by the negligence of his agent or servant within the scope and in the course of his employment, although he neither directs nor is aware of his acts. Philadelphia & Reading R. Co. v. Derby, 14 How. 468, 486, 14 L. Ed. 502; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 522, 10 Sup. Ct. 175, 33 L. Ed. 440. In the light of these rules of law, let us see whether or not there was any substantial evidence in this case that Perry was the agent of the oil company in the act of driving his team upon the track of the railroad company. There was testimony to the existence of these

Digitized by Google

facts: The oil company had storage tanks at Aurora, in the state of Nebraska, whence its oil was hauled by Perry's team to its customers in neighboring towns. The company owned the wagon and Perry the horses. The company fixed the prices of the oil and gasoline. Perry took them from the storage tanks, hauled and delivered them to the customers of the company in neighboring towns, sold all that he could in lots of 50 gallons each to others, collected all the money for these deliveries and sales, remitted it to the company weekly, and once a month the company paid him one cent for each gallon so delivered and sold. He devoted the principal part of his time to this occupation. He was not engaged for any specific length of time, and he was free to abandon the work, and the oil company was at liberty to discharge him at any time. The company directed him to keep its customers in four towns supplied with oil and gasoline, but it did not direct him when or by what routes he should draw these articles to them. He went to the customers whenever they needed the oil or gasoline which he supplied. Some time after Perry entered upon his work the company directed him to deliver oil to its customers at another town, Phillips, and he did so. He was on his way to Phillips when the accident which caused this suit occurred. By means of the horses and wagon he kept the customers in the towns it specified supplied with oil and gasoline pursuant to its direction. But he determined when, how, and by what roads he would drive his team to each town and customer. Perry testified of the beginning and end of his occupation in this way:

"Anyway, about November, Mr. Fender came here and I talked over the matter with him and he decided to hire me, and so I went to work for them. * * *

"Q. When did you quit their employ? A. Along in the fall.

"Q. How did you come to quit at that time? A. How?

"Q. I mean did you quit voluntarily or did they discharge you? A. They discharged me."

The witnesses divided upon the question whether or not the contract between the oil company and Perry was in writing. If it was, the written agreement was not in evidence, and the facts which have been recited are deduced from oral testimony. If these facts show that Perry was an independent contractor, or that at the instant or in the act of driving his team upon the crossing he was without the control and direction of the oil company, the latter was not liable for his act and a peremptory instruction in its favor should have been given. The facts that the storage tanks, the gasoline, the oil, the wagon, and the customers were the oil company's, that the company delivered to Perry the keys and the care of the tanks, that he drew the oil and gasoline from them into the wagon, then hauled it with his team to the customers, sold to others when he could, collected the proceeds of the sales and deliveries and remitted them to the company weekly, and was paid by the company one cent a gallon on the articles delivered and sold, are consistent with the inference that in the performance of all these acts Perry was the agent of the company, and that his relation began with the hiring and ended with the discharge. It is true he might have been the servant of the company in the care, delivery, sale of, and collection for the oil and gasoline and his own master in the selection of the routes over which, and the times and manner in

Digitized by Google

which he would drive his team to deliver the goods. But the latter acts are ordinarily within the scope and course of the employment of an agent to sell and deliver goods and to collect and remit their proceeds, and if, in this case, they were separated from the sales, deliveries, and collection, persuasive evidence is requisite to establish that fact, because it is out of the ordinary course of commercial dealings. The fact that Perry's compensation was agreed to be paid and was paid in solido for all that he did, including his hauling of the oil and gasoline and his sales, deliveries, collections, and remittances, indicates that all these acts were bound together and performed in the same relation, and the evidence that they were either by agreement or in fact so separated that he was an independent contractor in the performance of the former and the agent of the company in his relation to the latter is not so conclusive or convincing that all reasonable men in the exercise of an honest and unprejudiced judgment would agree that at the instant and in the act of driving upon the railroad Perry was his own master or without the command and direction of the company, while in the care, sale, delivery, and collection of the price of the oil and gasoline he was its agent. It is indisputable that there was substantial and persuasive evidence that in the performance of the latter acts Perry was the agent of the company subject to its command and direction. The driving of the team was an act ordinarily within the scope and course of such an agency, and, in view of the fact that the hauling and driving were paid for together with the acts of care, sale, and delivery, the evidence in this case is not so conclusive that he was not the agent of the company and subject to its command in the hauling and in the driving upon the crossing that it was the duty of the court below to withdraw that issue from the jury and to so hold as a matter of law. Singer Mfg. Co. v. Rahn, 132 U. S. 518, 522, 10 Sup. Ct. 175, 33 L. Ed. 440; Waters v. Pioneer Fuel Co., 55 N. W. 52, 52 Minn. 474, 38 Am. St. Rep. 564.

This action was brought under sections 2503 and 2504 of the Compiled Statutes of Nebraska of 1901, which authorized the administratrix of the estate of one killed by the wrongful act of another to maintain an action for the death for the exclusive benefit of the widow and next of kin, and provide that the jury "may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars." The next of kin in the case in hand were the minor children of the deceased. Counsel for the company complain that the court below permitted the widow to answer this question:

"Were you and your children dependent upon your husband for support and maintenance? A. Yes, sir."

They insist that this ruling was error, and cite the decisions of the Supreme Court of Nebraska which have adopted the rule that evidence of the value of the estate left by the deceased is inadmissible for the reason stated by Judge Cooley in Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205, 214, 215, in these words:

Digitized by Google

"What the family would lose by the death would be what it was accustomed to receive or had reasonable expectation of receiving in his lifetime; and to show that the family was poor has no tendency toward showing whether this was or was likely to be, large or small. One man contributes liberally in aid of his poor relatives, another delights in contributing luxuries where comforts are already abundant; but, when the contribution is cut off in either case, the extent of the loss is not measured by the wealth or poverty of the recipient, but by the contribution itself. A dollar lost, whether by poor man or rich man, is neither more nor less than a dollar, and a reasonable expectation of benefit to a certain amount must, when lost, be compensated to the same extent whether the loser be rich or poor." Chicago, R. I. & P. Ry. Co. v. Hambel, 89 N. W. 643, 644, 2 Neb. (Unof.) 607; Chicago, R. I. & P. Ry. Co. v. Holmes, 94 N. W. 1007, 68 Neb. 826.

But the evidence here introduced was not of the amount of the estate of the deceased, but of the dependency of the wife and children upon him in his lifetime for support and maintenance. The statute limited the recovery in this action to just compensation for the pecuniary injuries resulting to the beneficiaries of the statute from the death, and one of the objects of the introduction of this testimony was to prove that they suffered pecuniary injuries because they lost by the death of Parkinson their means of support and maintenance. If the beneficiaries of the statute in this action had been collateral heirs of the deceased or persons not legally dependent upon him in his lifetime, proof of their dependence upon him or of pecuniary injuries to them from his death would have been indispensable to a substantial recovery. Chicago, R. I. & P. Ry. Co. v. Young, 58 Neb. 678, 79 N. W. 556; Chicago, B. & Q. R. Co. v. Van Buskirk, 58 Neb. 252, 78 N. W. 514; Chicago, Burlington & Q. R. Co. v. Bond, 58 Neb. 385, 78 N. W. 710.

Proof of this nature is unnecessary when the beneficiaries are the widow and minor children of the deceased and where the prima facie legal presumption of their dependence is not overcome by countervailing evidence. But this is because they are legally dependent upon the husband and father during his lifetime, and the presumption of the law consequently is that they are pecuniarily injured by his death. Kearney Electric Co. v. Laughlin, 45 Neb. 390, 395, 63 N. W. 941; City of Friend v. Burleigh, 53 Neb. 674, 676, 74 N. W. 50; Omaha & Republican V. R. Co. v. Crow, 54 Neb. 747, 750, 74 N. W. 1066, 69 Am. St. Rep. 741. The presumption of legal dependence, however, is not a conclusive, but a rebuttal, presumption. The defendant had the right to meet and overcome it by evidence to the contrary, and, if it had done so, the resultant presumption of pecuniary injury from his death must have fallen. As the presumption was rebuttable and the plaintiff could not know before the defendant introduced its evidence whether or not it would present testimony to overcome it, her evidence in support of it was neither incompetent nor immaterial.

The judgment must be affirmed; and it is so ordered.

Digitized by Google

(152 Fed. 168.)

SOUTHERN PAC. CO. v. BURCH.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1907.)

No. 1,345.

REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURT—NONRESIDENCE OF PARTIES.

A federal court cannot acquire jurisdiction by removal of a suit in which such jurisdiction is dependent on diversity of citizenship, where neither of the parties is a resident of the district, and the plaintiff does not consent to such jurisdiction or waive his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 32, 33.]

In Error to the Circuit Court of the United States for the District of Nevada.

See 145 Fed. 443.

S. Summerfield and P. F. Dunne, for plaintiff in error.

Herbert R. Macmillan and H. H. Henderson, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This action was originally brought in one of the courts of the state of Nevada by the defendant in error as plaintiff, against the plaintiff in error as defendant, to recover damages for personal injuries alleged to have been sustained by the plaintiff to the action by reason of the negligence of the defendant thereto. The plaintiff being a resident and citizen of the state of Utah, and the defendant to the action being a corporation of the state of Kentucky, and therefore a resident and citizen of that state, upon the defendant's motion, and the filing of a petition and bond, the case was removed from the state court of Nevada to the United States Circuit Court for the District of Nevada, where the plaintiff to the action, defendant in error here, moved the court below to remand the case to the state court for lack of jurisdiction in the federal court over it, which motion the court below denied, and a trial thereof having been subsequently had, resulting in a verdict and judgment for the plaintiff, the case was brought here by the defendant thereto by writ of error.

Neither party to the suit being a citizen or resident of the state of Nevada at the time of its commencement, we must, without reference to the merits of the controversy, upon the authority of the case of Ex parte Abram C. Wisner (decided by the Supreme Court December 10, 1906) 27 Sup. Ct. Rep. 150, 51 L. Ed. 264, reverse the judgment, with costs to the defendant in error, and with directions to the court below to remand the case to the state court from whence it came, for lack of jurisdiction of the federal court over it.

Digitized by Google

(152 Fed. 887.)

SCHOOL DIST. NO. 11, DAKOTA COUNTY, NEB., v. CHAPMAN et al.

(Circuit Court of Appeals, Eighth Circuit. January 15, 1907.)

No. 2,173.

1. STATUTES—LEGALITY OF ENACTMENT—CONSTITUTIONAL REQUIREMENTS.

The provision of Const. Neb. art. 3, § 10, requiring the yeas and nays on the final passage of a bill by the Legislature to be entered on the journal of each house, as construed by the Supreme Court of the state, does not apply to a vote of concurrence by either house in an amendment adopted by the other, but only to the vote on the passage of the bill following its third reading in each house, which is treated as the vote on its final passage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 20.]

2. SAME—SILENCE OF LEGISLATIVE JOURNAL—PRESUMPTION.

Under the Nebraska decisions, an act of the Legislature is not invalidated because the journal of the house in which the bill originated is silent in respect to its concurrence in an amendment by the other house which appears in the act as enrolled and signed.

3. SAME—READINGS OF BILL—CONCURRENCE IN AMENDMENT.

The provision of Const. Neb. art. 3, § 11, requiring every bill to be read in each house on three different days, as construed by the Supreme Court of the state, does not make it necessary that there shall be three readings of a bill in the house in which it originated, and by which it has been duly passed, on its return for concurrence in an amendment adopted by the other house.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 16.]

4. SAME—TITLE OF ACT.

Where a legislative act as enrolled and authenticated bore the same title as the bill when introduced, and the journals contain no affirmative statement that the title was at any time changed or amended, the act is not invalidated by the fact that in the journal entries relating to the bill during its passage it is sometimes identified by an abbreviated title and its number.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 27.]

5. SAME—ERROR IN TITLE.

Act Neb. March 31, 1887 (Laws Neb. 1887, p. 597, c. 76), is entitled "An act to amend 'An act to provide for the issuing and payment of school district bonds' approved February 26, A. D. 1879, being subdivision 15 of chapter 79, Revised Statutes." The only preceding Revised Statutes were those of 1866, which being prior to the passage of the original act did not contain the same, but it constituted subdivision 15 of chapter 79 of the Compiled Statutes of 1881, and such Compiled Statutes were named in the body of the amendatory act. *Held*, that the obvious error in the title did not produce any uncertainty as to the subject of the amendatory act such as to render it invalid as in violation of the constitutional mandate that the subject of a bill shall be clearly expressed in its title.

6. SAME—AMENDATORY ACT—CONSTITUTIONAL REQUIREMENTS.

The provision of Const. Neb. art. 3, § 11, that "no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed," does not require that the purpose to repeal the original sections shall be expressed in the title of the amendatory act, nor is an amendatory act void, where it correctly recites the sections amended, because in the repealing clause there is an obvious error in giving the number of the chapter containing such sections.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 207.]

Digitized by Google

7. SAME.

Under the rule of decision in Nebraska, an amendment of a prior law, coupled with a formal repeal of such law, does not operate as a repeal of the original act in a constitutional sense, but continues it in effect in its amended form, and a subsequent amendatory act is not void because it refers to and purports to amend the original and not the amended act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 202, 203.]

8. TRIAL—WAIVER OF JURY—DISCRETION AS TO FINDINGS.

Where an action at law in a federal court is tried to the court without a jury, by stipulation pursuant to Rev. St. § 649 [U. S. Comp. St. 1901, p. 525], which provides that in such case the finding may be either general or special, whether such finding shall be general or special rests in the discretion of the court, and its refusal to make special findings is not subject to review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 920–926.]

9. SAME—DIRECTION OF VERDICT—REFUSAL—WAIVER OF EXCEPTION.

The denial of a request for a finding in favor of a defendant, in the nature of a directed verdict, made at the close of plaintiff's evidence, and an exception to such denial, are waived by the subsequent introduction by defendant of evidence in its own behalf.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 983.]

10. PLEADING—ISSUES—ADMISSIONS QUALIFYING GENERAL DENIAL.

Under the rule of practice in Nebraska, which governs in actions at law in a federal court in that state, a general denial in an answer is treated as qualified by admissions made in other defenses; and where, in an action on school district bonds, the answer contained a general denial, but also an admission of the execution and genuineness of the bonds, and pleaded their invalidity, the admission governs, and the plaintiff was not required to prove their execution and genuineness.

11. SCHOOLS AND SCHOOL DISTRICT—BONDS—INNOCENT PURCHASER.

Where bonds of a school district in Nebraska payable to bearer contained recitals that they were issued for a certain purpose "and in pursuance of" a certain statute, which authorized their issuance for such purpose, and also bore a certificate of the state Auditor of Public Accounts that they were duly registered, and another by that officer and the Secretary of State showing that they were issued pursuant to law, as required by the statute, evidence that such bonds were purchased before their maturity in New York in the regular course of business by a dealer in such securities at practically their face value, and in reliance on such recitals and certificates, is sufficient to sustain a finding that he was an innocent purchaser for value, and entitled to protection as such.

12. SAME—VALIDITY—NEBRASKA STATUTE.

Act Neb. Feb. 26, 1879 (Laws 1879, p. 170) as amended by Act March 31, 1887 (Laws 1887, p. 597, c. 76), which authorizes school districts to issue bonds "to purchase a site for, or erect a school house, or houses, or for furnishing the necessary furniture or apparatus for the same, or for all of these purposes," authorizes such issuance for either one or all of the purposes stated, and such bonds are not invalid because they recite that they were issued "for the purpose of building a schoolhouse" only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 224.]

13. SAME—RIGHTS OF PURCHASER—NOTICE OF INVALIDITY.

Bonds of a Nebraska school district were sold by a banker in New York, and bore certificates of registration and regularity by designated officers of the state, as required by the statute under which they were issued. The purchaser was told by the banker that a suit had been brought to enjoin such registration and certification, but that it had been dismissed, and the banker produced the bonds bearing certificates by such officers of due registration and regularity. In fact the suit had not been dismissed, and it

Digitized by Google

subsequently resulted in the granting of a permanent injunction as prayed for. *Held*, that such facts sustained a finding that the purchaser was not chargeable with actual notice of the pendency of the suit.

14. SAME—PENDENCY OF SUIT—CONSTRUCTIVE NOTICE.

A purchaser of negotiable bonds issued by a school district, which are regular on their face and bear the certificates of state officers that they were issued pursuant to statutory authority, is not chargeable with constructive notice of a pending suit to contest the election at which the bonds were authorized, brought under a general statute of the state authorizing suits to contest the election of any person to office, or the adoption of any proposition submitted to a vote of the people, but containing no provision for superseding the result of any election as declared by the canvassers pending such a suit; nor is such a purchaser chargeable with constructive notice of a temporary injunction granted in such suit restraining the issuance of the bonds, they having been in fact issued in due form.

In Error to the Circuit Court of the United States for the District of Nebraska.

Elbert H. Hubbard, B. H. Dunham, and Eric A. Burgess, for plaintiff in error.

James M. Woolworth and W. D. McHugh. for defendants in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and POLLOCK, District Judge.

VAN DEVANTER, Circuit Judge. This writ of error challenges a judgment recovered by the defendants in error against the school district in an action at law upon certain coupons clipped from bonds issued by the school district in pursuance of a statute of the state of Nebraska, approved February 26, 1879 (Laws 1879, p. 170), and other acts amendatory thereof, including that of March 31, 1887 (Laws 1887, p. 597).

The chief contentions presented by the assignments of error are to the effect that the amendatory act of 1887 is invalid because certain of the requirements of article 3 of the Constitution of the state were not observed in its enactment. Three sections of this article are as follows:

"Sec. 8. Each house shall keep a journal of its proceedings, and publish them. * * *"

"Sec. 10. The enacting clause of a law shall be 'Be it enacted by the Legislature of the state of Nebraska,' and no law shall be enacted except by bill. No bill shall be passed except by assent of a majority of all the members elected to each house of the Legislature. And the question upon final passage shall be taken immediately upon its last reading, and the yeas and nays shall be entered upon the journal.

"Sec. 11. Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto shall be printed before the vote is taken upon its final passage. No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed. The presiding officer of each house shall sign, in the presence of the house over which he presides, while the same is in session and capable of transacting business, all bills and concurrent resolutions passed by the Legislature."

The legislative journals, as published by authority, disclose these facts respecting the bill for the act in question: It originated in the

Digitized by Google

House of Representatives, where it was passed by the constitutional majority, the vote being taken by yeas and nays which were entered upon the journal. In the Senate it was amended and passed in its amended form by the requisite majority; the vote being taken and entered as in the House. It was then returned to the House with the request that the amendment be concurred in, but whether this was done, and if so by what majority, and in what manner the vote was taken, are matters in respect of which the journal of the House is silent. As enrolled under the supervision of the joint committee on enrollment, as signed by the presiding officer of each house, and as presented to and approved by the Governor, the bill embodied the amendment.

It is insisted that the amendment could only have been concurred in by a vote of the house in which the yeas and nays were taken and entered upon the journal, and that the absence of such an entry renders the act void. Whether or not the insistence is well taken is to be determined by ascertaining what is the proper construction and application of the state Constitution, as settled by the decisions of the court of last resort of the state. South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154; Post v. Supervisors, 105 U. S. 667, 26 L. Ed. 1204. Turning to the decisions of that court, we find that in Hull v. Miller, 4 Neb. 503, it was held that a provision in the state Constitution of 1866, substantially the same as that in section 10, supra, respecting the entry upon the journal of the yeas and nays on the passage of a bill, did not apply to a vote of concurrence by either house in an amendment of the other, but only to the vote taken upon the passage of a bill following its last or third reading in each house, which was treated as the vote on its final passage. And in State ex rel. v. Liedtke, 9 Neb. 490, 4 N. W. 75, which related to an act passed after the adoption of the present Constitution, the court, after observing that "the words 'final passage,' as applied to matters of legislation, were well known to the framers of the Constitution, and presumably to the people who adopted it," held that the requirement of section 11, supra, that "the bill and all amendments thereto shall be printed before the vote is taken upon its final passage," does not apply to an amendment proposed by a committee of conference after disagreeing votes in the two houses, but only to amendments proposed before the vote following the last or third reading in each house, which was again treated as the vote on final passage. These decisions show that, under the authoritative interpretation of the state Constitution, a concurrence by one house in an amendment of the other is not the final passage of a bill on which the yeas and nays are required to be taken and entered upon the journal.

It is next insisted that, though such concurrence be not the final passage of a bill within the meaning of section 10, supra, the entire silence of the journal respecting a concurrence by the House renders the act void. But the rule in Nebraska is otherwise, at least in respect of matters like this which are not specially required by the Constitution to be entered upon the journal. It was so held in Hull v. Miller, supra, where the court said of the requirement that every bill shall be read on three different days:

Digitized by Google

"But inasmuch as it is not required, as it is in respect of bills on their final passage, that each house shall enter upon its journal and preserve the evidence of its having obeyed this rule, it will be presumed that they did so, unless the contrary clearly appear."

In other cases, notably Webster v. Hastings, 59 Neb. 563, 568, 81 N. W. 510, and State v. Burlington & Missouri River R. R. Co., 60 Neb. 741, 746, 84 N. W. 254, the rule relating to the impeachment of a duly authenticated and enrolled act by reference to the legislative journals is stated in this way:

"The rule established by our former decisions is that the due authentication and enrollment of a statute affords only prima facie evidence of its passage, and that the legislative journals may be examined for the purpose of ascertaining whether the measure was enacted in the mode prescribed by the Constitution. If the entries found in the journals explicitly and unequivocally contradict the evidence furnished by the enrolled bill, the former will prevail. The journals, being the records of legislative proceedings kept in obedience to the command of the Constitution, are considered the best evidence of what affirmatively appears in them regarding the enactment of laws."

And in State v. Frank, 60 Neb. 327, 333, 83 N. W. 74, 75, it was said, after refering to prior decisions:

"What they decide is that the journals are unimpeachable evidence of what they contain; not that their silence convicts the Legislature of having violated the Constitution. Every presumption is in favor of the regularity of legislative proceedings; and it is rather to be inferred that the journals are imperfect records of what was done than that the Legislature failed to perform the more solemn and important duties enjoined upon it by the Constitution. In Ex parte Howard-Harrison Iron Co., 119 Ala. 484, 491, 24 South. 516, 519, 72 Am. St. Rep. 928, cited in State v. Abbott, 80 N. W. 499, 59 Neb. 106, it is said: 'Of course, the presumption is that the bill signed by the presiding officers of the two houses and approved by the Governor is the bill which the two houses concurred in passing, and the contrary must be made to affirmatively appear before a different conclusion can be justified or supported. So here it must be made to affirmatively appear that amendments of the house bill in question were adopted by the Senate, and were not concurred in by the House.' The enrolled bill has its own credentials, it bears about it legal evidence that it is a valid law, and this evidence is so cogent and convincing that it cannot be overthrown by the production of a legislative journal that does not speak, but is silent. Such seems to be the conclusion reached by a majority of the courts; and such, certainly, is the trend of modern authority. To hold otherwise would be to permit a mute witness to prevail over evidence which is not only positive, but of so satisfactory a character that all English and most American courts regard it as ultimate and indisputable."

The last case upon the subject is State ex rel. v. City of Wahoo, 62 Neb. 40, 86 N. W. 923, and it was there held that an act originating in the Senate was not invalidated, because the journal of that body was silent in respect of its concurrence in an amendment of the House which was embodied in the enrolled act.

The validity of the act is also questioned because the bill, after its amendment by the Senate, was not read at large on three different days in each house. But of this it is enough to observe that it is authoritatively settled by the decisions of the Supreme Court of the state that amendments made during the process of enactment do not take from a bill the status obtained by prior readings or make it necessary to begin the readings anew. Cleland v. Anderson, 66 Neb. 252, 262, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075; State v. Liedtke, 9 Neb. 490, 4 N. W. 63.

Digitized by Google

Another objection urged against the act is that it did not pass both houses and receive the approval of the Governor under the same title. The facts bearing upon the objection are these: When the bill was introduced, its title, as is alleged in the answer of the school district, was that of a bill for "An act to amend an act entitled 'An act to provide for the issuing and payment of school district bonds,' approved February 26, A. D. 1879, being subdivision 15 of chapter 79, Revised Statutes." And such is the title of the enrolled act as authenticated by the presiding officers of the two houses and as approved by the Governor. The journals contain no affirmative statement that the title was at any time changed or amended. Save in one unimportant instance, they identify the bill by the number given to it when it was introduced. In some instances they also give the full title as here set forth, but more frequently, as in the entries reciting its final passage, they designate it as "A bill for an act to amend an act to provide for the issuing and payment of district bonds." The objection rests upon the assumption that each form of identification must be accepted as conclusively establishing what the title was at that time. The assumption is not well founded. There is no constitutional or other requirement that the journal entries shall identify the bill to which they relate by a recitation of its title. State v. Burlington & Missouri River R. R. Co., 60 Neb. 741, 748, 84 N. W. 254; Nelson v. Haywood County, 91 Tenn. 596, 20 S. W. 1; Field v. Clark, 143 U. S. 649, 671, 12 Sup. Ct. 495, 36 L. Ed. 294. And a careful examination of all the entries relating to this bill discloses without any question that the shorter form of identification was employed as an abbreviated and convenient means of description, and not as a full or accurate statement of the title. To illustrate: Although the bill originally bore the full title here set forth, the entry of its introduction in the House employs the shorter description. The report of its engrossment in the House, preparatory to its being read a third time and put on final passage, gives the full original title, but the entry of such reading and passage employs the shorter description. So also the report of its engrossment in the Senate gives the full original title, but the next succeeding entries employ the shorter description. After its passage by both houses it was enrolled with its full original title and was so reported by the joint committee on enrollment, and yet the subsequent entries of its authentication by the presiding officers of the two houses employ the shorter description. And of the entries of its presentation to the Governor by the appropriate joint committee that in the Senate Journal gives the full original title while that in the House Journal employs the shorter description. Thus the journals themselves show that when the shorter description was employed it could not have been, and was not, intended as a full or accurate statement of what the title was at that time. And this conclusion is strengthened by the communication from the Governor's office, set forth in the House Journal, announcing his approval of the enrolled act, and designating it by the shorter description, although the act then bore the full original title. In these circumstances it cannot be reasonably said that the journal entries containing the shorter form of identifica-

Digitized by Google

tion purport to fully or accurately state the title or to do more than employ an abbreviated and convenient description of the bill. As has been shown, the evidence of due enactment, furnished by the authenticated and enrolled act, is overcome only when it is unequivocally contradicted by the journals. There is no such contradiction here, so the objection must be overruled. The cases cited to support it are distinguishable because the journal entries there under consideration purported to fully and accurately state the title as it was at the times to which they severally related and affirmatively and unequivocally disclosed that it had been changed without the assent of part of the lawmaking power.

The title of the act is "An act to amend an act entitled 'An act to provide for the issuing and payment of school district bonds,' approved February 26, A. D. 1879, being subdivision 15 of chapter 79, Revised Statutes" (Laws 1887, p. 597, c. 76). The only preceding Revised Statutes were those of 1866, and they did not provide for the issuing or payment of school district bonds. This, it is urged, renders the title uncertain, and violates the constitutional mandate that the subject of the act shall be clearly expressed in its title. It must be ruled otherwise. The title definitely and accurately gives the title and date of the original act intended to be amended. That act could not have been embraced in the Revised Statutes of 1866, because it had not then been enacted. It did, however, constitute subdivision 15 of chapter 79 of the Compiled Statutes of 1881. They, and not the Revised Statutes, are named in the body of the amendatory act. In these circumstances the obvious error in the title produces no uncertainty as to the subject of the act, and is immaterial. The case is unlike that of State v. Burlington & Missouri River R. R. Co., 60 Neb. 741, 84 N. W. 254, cited by counsel, because there the erroneous reference to the Revised Statutes was not accompanied by any adequate reference to the original act, but stood alone.

Conformably to one of the requirements of the Constitution before set forth, the act, as will be shown presently, formally repeals the original sections which it amends, and because the title does not express the purpose to do this it is said to be fatally defective. The contention is both narrow and unsound. As was held in Union Pacific R. R. Co. v. Sprague, 69 Neb. 48, 95 N. W. 46:

> "An amendatory act cannot become effective without expressly repealing the amended statute, and repealing by implication all repugnant or inconsistent laws; hence an intention to repeal is always necessarily implied, and need not be expressed [in the title] in order to apprise the members of the Legislature and the public that the new law, if adopted, will take the place of the old one."

While the act amends sections 4 and 5 of subdivision 15 of chapter 79 of the Compiled Statutes of 1881, it purports to repeal the like sections of chapter 59; and because of this it is claimed that the Legislature did not respect the constitutional mandate that the sections amended shall be repealed. Chapter 59 contains no subdivision numbered 15, nor any section numbered 4 or 5, and is entirely foreign to the subject of the act as expressed in the title. So it is obvious that the reference to that chapter is an error. But the chapter which was

Digitized by Google

actually in contemplation is not left in doubt. When the act is considered in its entirety, and in the light of the presumed purpose of the Legislature to respect the constitutional mandate, as it must be, it is perfectly plain that it was intended to repeal the sections which were amended. They were correctly described in the title as being in chapter 79, and that description corrects and controls the obviously erroneous one in the repealing clause. Richards v. State, 65 Neb. 808, 812, 91 N. W. 878; 2 Sutherland, Stat. Con. (2d Ed.) § 410; Black on Interpretation of Laws, 80; Broom's Legal Maxims (7th Eng. Ed.) 470.

The sections which are amended had been amended and repealed, conformably to the Constitution, by the act of February 24, 1883 (Laws 1883, p. 301, c. 73). This, it is said, entirely eliminated them from the original statute, and made it indispensable that any subsequent amendatory act should deal with them as part of the act of 1883. The contention rests upon a misapprehension of the effect of such a combined amendment and repeal. The uniform rule of decision in Nebraska is that the original sections are not thereby completely abrogated or abolished, but thenceforth have operation and effect in their amended form as part of the statute in which they were originally enacted. State v. Babcock, 23 Neb. 128, 36 N. W. 348; State v. Kearney, 49 Neb. 325, 68 N. W. 533; State v. Wahoo, 62 Neb. 40, 86 N. W. 923; State v. Bemis, 45 Neb. 724, 64 N. W. 348. In the last case an amendatory act similar to the one now under consideration was sustained, and a contention like that now made was disposed of in this way:

"The fallacy of that argument lies in the assumption that the effect of the amendatory acts is in any proper sense a repeal of the original section. True, as provided by section 11, article 3, of the Constitution, 'No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed,' but the term 'repeal' is therein evidently employed in the sense in which it was understood at the time the Constitution was adopted. It had before that time been definitely settled as a rule of construction that the simultaneous repeal and re-enactment of the same statute in terms or in substance is a mere affirmance of the original act, and not a repeal in the strict or constitutional sense of the term. * * * The act of 1891 (Laws 1891, p. 121, c. 7) did not abolish section 145 as originally enacted (Laws 1887, p. 187, c. 10), or as amended in 1889 (Laws 1889, p. 142, c. 13), but, on the contrary, re-enacted it in terms with the exceptions above noted. Nor is the fact that the act of 1891 refers to the section as it appears in the Compiled Statutes at all material, since it was the original act which was amended, the reference to the compilation being for convenience only."

As the objections urged against the validity of the legislation under which the bonds were issued have been found untenable, it becomes necessary to consider the other assignments of error.

The trial was to the court, without the intervention of a jury, pursuant to a stipulation in writing filed with the clerk, and the finding upon the issues of fact was general. A proposed special finding tendered by the defendant was not adopted, and this is in effect made the subject of several assignments of error. But the ruling is not subject to review. When the trial is to the court, without the intervention of a jury, whether the finding shall be general or special rests in the discretion of the court in like manner as it rests in its discre-

Digitized by Google

tion, when the trial is with a jury, to require that the verdict be general or special. The statute (Rev. St. U. S. § 649 [U. S. Comp. St. 1901, p. 525]) declares that the finding "may be either general or special," but it does not give to one of the litigants the right to determine which it shall be.

At the close of the plaintiffs' case in chief the defendant requested a finding in its favor in the nature of a directed verdict, assigning as reason therefor that there was no substantial evidence to sustain a finding for the plaintiffs. The request was denied, and complaint is made of this. But it need not be noticed further than to say that the defendant subsequently proceeded with the introduction of evidence in its own behalf, and thereby waived the request and the exception taken to its denial. Hughes County v. Livingston, 43 C. C. A. 541, 555, 104 Fed. 306; Barnard v. Randle, 49 C. C. A. 177, 110 Fed. 906; Burton v. United States, 73 C. C. A. 243, 142 Fed. 57.

At the conclusion of all the evidence the defendant made a like request which was also denied. That ruling was excepted to at the time, and is now properly presented for review, so it is necessary to consider whether or not there was any substantial evidence to sustain a finding for the plaintiffs. If there was, the ruling was right, otherwise it was an error of law.

There was no evidence of the execution and genuineness of the bonds and coupons. But whether or not that was fatal to the plaintiffs' case depends upon the correct construction of the defendant's answer. One of the defenses was substantially a general denial, but others admitted the execution and genuineness of the bonds and coupons, and sought to avoid liability upon the latter by reason of various matters which were alleged, such as that "at the time of the issuing of said bonds" the assessed valuation of the taxable property in the school district was not such as to permit the incurrence of such an indebtedness, that the bonds were "fraudulently issued" for an unlawful purpose and without any consideration to the school district, and that they were "delivered" in violation of a subsisting injunction restraining the officers of the district from so doing. The action being at law, the answer should be construed as it would be in the courts of the state. Rev. St. U. S. § 914 [U. S. Comp. St. 1901, p. 684]; Northern Pacific R. R. v. Paine, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513. In those courts it is the uniform practice in respect of such a pleading to treat the denial as qualified by the admission. Thus, in School District v. Holmes, 16 Neb. 486, 20 N. W. 721, which was an action to recover upon a bond alleged to have been issued by the school district, the answer contained a general denial and also a plea of partial payment, and it was held that the former was inconsistent with and qualified by the latter. In Bierbower v. Polk, 17 Neb. 268, 278, 22 N. W. 698, which was an action for the conversion of a stock of merchandise, the answer contained a general denial and also a plea justifying the taking and sale of the stock, and of this the court said:

"We will not try to harmonize the general denial with the other allegations of the answer, but will only say that it must be quite difficult to deny a proposition and admit its truth in the same verified pleading. The denial must yield to the admission."

Digitized by Google

And in Dwelling House Ins. Co. v. Brewster, 43 Neb. 528, 61 N. W. 746, where the reply contained a general denial of what was alleged in the answer, and also set up certain matters in avoidance, it was held that the latter part of the reply qualified the denial and should be treated as an admission of what was sought to be avoided. See, also, Dinsmore v. Stimbert, 12 Neb. 433, 11 N. W. 872; State v. Hill, 47 Neb. 456, 497, 66 N. W. 541; Home Fire Ins. Co. v. Johansen, 59 Neb. 349, 80 N. W. 1047; First National Bank v. Grosshans, 61 Neb. 575, 579, 85 N. W. 542; Northern Pacific R. R. Co. v. Paine, supra. It follows that the answer, when correctly construed, did not put in issue, but admitted, the execution and genuineness of the bonds and coupons, and therefore that no evidence upon that subject was required.

It is said that there was no evidence of the plaintiffs' ownership of the coupons sued upon. The contrary, however, is plainly shown by the record. Both the bonds and the coupons were payable to bearer. Edward D. Shepard, the original purchaser of the bonds, to whose testimony further reference will be made, testified that he sold three of the bonds to William Bostwick, and retained the others; that the coupons sued upon consisted in part of coupons clipped from Bostwick's bonds and in part of coupons which were clipped from Shepard's bonds and then sold to Bostwick. And at the trial the coupons were in the possession of, and were produced in evidence by, the plaintiffs, who were Bostwick's administrators and were suing in that capacity.

Assuming, but without deciding, that the circumstances in which the bonds were issued were such that there could be no recovery thereon, or upon any of the coupons, save by an innocent purchaser, or by one who acquired them through such a purchaser, unnecessary discussion will be avoided by at once coming to the question whether or not there was evidence to sustain a finding that Edward D. Shepard was an innocent purchaser. The bonds contained a recital that they were issued "for the purpose of building a schoolhouse in said district, and in pursuance of" the act of February 26, 1879, and the amendments thereto, and also bore a certificate by the Auditor of Public Accounts that they were duly registered, and another by that officer and the Secretary of State showing that they were issued pursuant to law, as was required by said act. Shepard was a witness for the plaintiffs, and his testimony, which was uncontradicted, was in substance as follows: As an investor in municipal securities he purchased the bonds in New York City in the regular course of business, paying therefor 97 per cent. of their face value with accrued interest. (The check by which payment was made was produced in evidence.) None of the bonds, nor any of the coupons attached to them, was then due. He read one of the bonds, and relied upon the recital therein and the certificates thereon, and also upon the written opinion of a reputable attorney of wide experience in matters pertaining to municipal securities, to the effect that the issuance of the bonds had been regularly authorized, and that they were in due form and were legally binding upon the district. At the time of the purchase the banker through

Digitized by Google

whom it was made told him that a suit had been brought to prevent the registration of the bonds by the state officers, and that it had been dismissed, but he did not otherwise hear or know of their validity being questioned until three or four months thereafter. When due effect is given to the recital in the bonds, and to the certificates of the state officers indorsed thereon (see Hughes v. Livingston County, 43 C. C. A. 541, 104 Fed. 306; Platt v. Hitchcock County, 71 C. C. A. 649, 139 Fed. 929; Gamble v. Rural Ind. School Dist., 76 C. C. A. 539, 146 Fed. 113), it is quite plain that this testimony was sufficient to sustain a finding that Shepard was an innocent purchaser for value before maturity, unless there be merit in some of the contentions now to be considered.

The bonds contained the recital, "Total amount of bonds issued by said district $24,000," and it is said that this, together with the last assessment of the taxable property of the district, disclosed that the statutory limitation upon the amount of bonds which could be issued had been exceeded. The contention is disposed of by the ruling which sustains the validity of the amendatory act of 1887, whereby the limitation was increased from 5 to 10 per cent. of the assessed valuation. This issue of bonds amounted to $22,000 and with a prior issue of $2,000 made the total stated in the recital, which was within the increased limitation.

The first section of the statute declared that school districts could issue bonds "for the purpose of purchasing a site for, and erecting thereon, a schoolhouse or schoolhouses, and furnishing the same," and because these bonds recited that they were issued "for the purpose of building a schoolhouse," it is said that they disclosed that they were not issued for a lawful purpose. Differently stated, the contention is that the statute permitted the issuance of bonds for the threefold purpose of purchasing a site, erecting a schoolhouse thereon, and furnishing the same, but not for the single purpose of erecting a schoolhouse, though the district may have had a suitable site therefor and other means of furnishing the building when erected. The statute was not so unreasonable. Its purpose, as stated in section 3, was to enable a school district to issue bonds "to purchase a site for, or erect a schoolhouse, or houses, or for furnishing the necessary furniture and apparatus for the same, or for all of these purposes." Whether or not the statement in the bonds of the purpose for which they were issued sufficiently conformed to the statement in the proceedings leading to their issuance is not material to the present inquiry because there was evidence to sustain a finding that Shepard purchased without notice of the want of conformity, if there was such.

At the time of his purchase a suit was pending in one of the courts of the state in which the election at which the bonds were voted was being contested and in which a temporary injunction restraining their registration and issuance had been granted. The suit was subsequently prosecuted to a successful conclusion of the contest, and the injunction was made perpetual. That he purchased with actual notice of the pendency of this suit is said to be a necessary conclusion from the fact that the banker through whom he purchased told him at that time that a suit had been brought to prevent the registration of

Digitized by Google

the bonds by the state officers. The claim is fallacious. It ignores a material part of what the banker said, that is, that the suit had been dismissed, which could have been reasonably regarded as confirmed by his possession of the bonds bearing certificates of their due registration and issuance signed by the designated state officers. Thus, a finding that Shepard purchased without actual notice of the pendency of the suit was at least an admissible one under the evidence. Clark v. Evans, 13 C. C. A. 433, 66 Fed. 263; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Cromwell v. County of Sac, 96 U. S. 51, 58, 24 L. Ed. 681.

Finally, it is said that the statute, under which the election at which the bonds were voted was being contested, superseded the result of the election as declared by the canvassers, and suspended the power of the district officers to act thereon, during the period prescribed for beginning a contest, and during the pendency of any contest begun within that period; and, upon the assumption of the correctness of this contention, it is argued that Shepard, being chargeable with knowledge of the statute, could not become an innocent purchaser pending a contest begun within the prescribed period, as this one was. The contention has no support in the statute which gave authority for issuing the bonds, for there was no provision therein for contesting the election. Nor does it have any support in the general statute which provides for contesting "the election of any person to any public office, the location or relocation of a county seat or any proposition submitted to a vote of the people" (Comp. St. Neb. c. 26, § 64 et seq.), for there is nothing therein indicative of an intent to supersede the result of an election as declared by the canvassers, or to suspend action thereon, during the period prescribed for beginning a contest or during the pendency of a contest begun within that period. And that such is not the intent of this statute is manifest when it is considered that it puts the contest of an election on a proposition submitted to a vote of the people upon the same footing as the contest of an election of a person to a public office, for it is the accepted rule that, unless there be some provision therein to the contrary, a statute authorizing contests of the latter sort does not at all postpone or suspend the right of one, whose election is declared by the canvassers, to qualify and exercise the functions of the office. McCrary on Elections (3d Ed.) § 267. Doubtless it was in this view of the statute that the contestants sought, and the court granted, a temporary injunction restraining the registration and issuance of the bonds pending the contest. Counsel for the school district, while frankly confessing their inability to find any decision directly in point, place much reliance upon the opinion in Stewart v. Lansing, 15 Blatchf. 281, Fed. Cas. No. 13,432. That was an action upon coupons cut from bonds issued on behalf of the town in aid of the construction of a railroad. The statute giving authority for the issuance of such bonds made it a condition that it should satisfactorily appear to the county judge that their issuance was desired by a majority of the taxpayers, representing a majority of the taxable property of the town, and provided that, if it should so appear, he should appoint commissioners to issue them, and that his decision should have the same force and effect as other

Digitized by Google

judgments of courts of record in the state. Another statute authorized the review by the Supreme Court of the state upon writ of certiorari of all questions of law and fact determined by the county judge in such a proceeding. Upon a petition presented to him the county judge determined that the issuance of the bonds, from which the coupons in suit were cut, was desired by the requisite number of taxpayers, and appointed commissioners to issue them. The proceeding was then removed upon writ of certiorari to the Supreme Court of the state, where the judgment of the county judge was reversed. But before the reversal the commissioners, notwithstanding the pendency of the writ, issued the bonds, and thereafter the coupons in suit came to be held by the plaintiff. The Circuit Court held that he was chargeable with constructive notice of the proceedings upon the writ of certiorari, and therefore could not be an innocent purchaser, and in its opinion said:

"It is also true that, as these bonds are negotiable commercial securities, an ordinary lis pendens would not affect them in the hands of an innocent purchaser. Warren Co. v. Marcy, 97 U. S. 96, 24 L. Ed. 977. But this litigation upon the certiorari was different. It affected the judgment itself, which was the foundation of all authority to issue the bonds, and not the parties merely, and, until it should be ended, leaving the judgment in force, there could be no such authority. In this case it was ended by holding the judgment for naught altogether, so that there never was a time from the commencement of the proceedings upon certiorari, by service of the writ, to their termination, when there was authority, or color of authority, for issuing the bonds. They were issued under a general law of the state of New York providing for their issue only upon such a judgment, which was, by another general law, subject to review by such proceedings, and the proceedings were all upon the open and known public records of the courts of the state; and, probably, all persons dealing in them would be bound to know the general laws concerning them, and to look for the proceedings under the law by which only they could ever have any vitality, if they desired to know, the same as all persons are bound to know the general laws, and the necessity and effect of proceedings under them, relating to other subjects. But dealers in these bonds were not left to make good their presumed knowledge of the law by searching it out. The bonds themselves on their face referred to the law of their origin. This affected them directly with notice of all the requirements of that law. McClure v. Township of Oxford, 94 U. S. 429, 24 L. Ed. 129. By that they would be informed, or be bound to act as if informed, that the authority to issue the bonds would depend wholly upon a judgment with which the commissioners had nothing of the making to do, and concerning which they would have the same opportunities to learn, by examining the records, as any other persons. An examination of the records would have shown them that the proceedings had been removed and that there was no judgment in force remaining."

It may be that what was thus said gives color to the present contention; but, if so, it was effectually disapproved when later on the case came before the Supreme Court of the United States, for that court, although affirming the judgment, distinctly recognized that the pendency of the writ of certiorari did not preclude the plaintiff from becoming an innocent purchaser, and proceeded to inquire whether or not there was evidence that "he was in a commercial sense the bona fide holder of the coupons sued for." Stewart v. Lansing, 104 U. S. 505, 509, 26 L. Ed. 866. See, also, Lytle v. Lansing, 147 U. S. 59, 62, 13 Sup. Ct. 254, 37 L. Ed. 78. That court had before held that one who was in fact a bona fide purchaser of bonds issued in the like

Digitized by Google

circumstances was not affected with constructive notice of the pending proceeding to review the judgment of the county judge. Orleans v. Platt, 99 U. S. 676, 25 L. Ed. 404. These cases, however, did not announce a new rule, but merely gave effect to the prior decision in County of Warren v. Marcy, 97 U. S. 96, 24 L. Ed. 977, wherein the doctrine of constructive notice arising from a pending suit was pronounced inapplicable to negotiable securities, as is shown by the following extracts from the opinion:

"It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purchase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way. This exception was suggested by Chancellor Kent in one of the leading cases on the subject in this country, and has been confirmed by many subsequent decisions. * * * Its object is to protect the commercial community by removing all obstacles to the free circulation of negotiable paper. If, when regular on its face, it is to be subject to the possibility of a suit being pending between the original parties, its negotiability would be seriously affected, and a check would be put to innumerable commercial transactions. These considerations apply equally to securities created during, and to those created before the commencement of, the suit, and as well to controversies respecting their origin as those respecting their transfer. Both are within the same mischief and the same reason."

It sometimes happens, as in the present case, that such securities are issued or negotiated in violation of a subsisting injunction in a pending suit, but that can make no difference in the rights of one who is in fact a bona fide purchaser, for the obvious reason that constructive notice of the injunction cannot be charged against one who is in no way charged with notice of the suit. Lexington v. Butler, 14 Wall. 282, 20 L. Ed. 809; County of Warren v. Marcy, 97 U. S. 96, 109, 24 L. Ed. 977; County of Cass v. Gillett, 100 U. S. 585, 593, 25 L. Ed. 585; Tregea v. Modesto Irrigation District, 164 U. S. 179, 187, 17 Sup. Ct. 52, 41 L. Ed. 395.

The several matters presented in support of the claim that the defendant's request for a finding in its favor in the nature of a directed verdict should have been sustained have now been considered, and none of them has been found to be tenable.

Error is assigned upon some of the rulings in the admission and rejection of evidence, but special notice of such of them as would otherwise merit attention is rendered unnecessary by what has been said.

No error being disclosed by the record, the judgment is affirmed.

(152 Fed. 900.)

STEARNS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1907.)

No. 2,411.

1. CONSPIRACY—INDICTMENT—CONSTRUCTION.

While a charge of conspiracy to defraud the United States under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], which wholly omits some essential element of the offense, cannot be aided by the statement of acts done to effect its object, this does not prevent reference to such state-

Digitized by Google

ment for the purpose of ascertaining the sense in which terms are used in charging the conspiracy.

2. SAME.

An indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], which charges a conspiracy to defraud the United States of certain of its lands by means of false forged and fraudulent entries thereof under the homestead law, and avers that such lands were "in the district of lands subject to entry under the homestead laws of the United States" at a certain land office, and also in stating the acts done pursuant to such conspiracy charges the filing of applications for homestead entry of certain described "public lands of the United States subject to homestead entry," is not fatally defective, because in charging the conspiracy it does not expressly aver that the lands of which it was the purpose to defraud the United States were public lands, subject to homestead entry.

3. PUBLIC LANDS—MEANING OF TERM.

The words "public lands," used in connection with entries in the land offices of the United States, if nothing be said to the contrary, relate to lands of the United States which are subject to disposition in some form under the public land laws, and not to those which are set apart and used for some special public purpose, such as post office sites, military reservations, and the like.

4. SAME—HOMESTEAD ENTRIES—USE OF TO DEFRAUD UNITED STATES WHEN LANDS NOT SUBJECT TO DISPOSAL IN THAT WAY.

Not all public lands are subject to homestead entry, and yet such an entry may be employed as a means of defrauding the United States of public lands not subject to disposal in that way, as where the exception turns upon a question of fact, such as whether the lands contain valuable coal or mineral deposits.

5. CONSPIRACY—INDICTMENT—STATEMENT OF MEANS OF EFFECTING OBJECT.

Quære, whether it is necessary, in an indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], to set forth the means of effecting the object of the conspiracy charged, or to describe them so fully as to make their adequacy apparent.

6. CRIMINAL LAW—MOTION IN ARREST OF JUDGMENT—GROUNDS.

The objection that an indictment for conspiracy to defraud the United States of certain public lands does not make it altogether clear to what lands the conspiracy related cannot be taken by a motion in arrest of judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2454.]

7. SAME—MOTION FOR DIRECTION OF VERDICT—GROUNDS.

A verdict of acquittal in a criminal case will not be directed because of a defect in the indictment, unless it is one which would be fatal on motion in arrest of judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1727.]

8. SAME—WAIVER OF EXCEPTION TO RULING.

An exception to the overruling of a motion for a directed verdict of acquittal at the close of the government's case on the ground of the insufficiency of the evidence is waived by the defendant by introducing evidence in his own behalf.

[Ed. Note—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2124.]

9. CONSPIRACY—DEFRAUDING UNITED STATES—POSSESSION OF PUBLIC LANDS.

A conspiracy to defraud the United States of the possession of public lands by means of fraudulent homestead entries is within Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], although there is no purpose to carry the preliminary entries to final entry and patent.

Digitized by Google

10. PUBLIC LANDS—"ENTRIES"—MEANING OF TERM.

In statutes and in common parlance the word "entries," when applied to proceedings in the land office under the homestead law, is used with various meanings—sometimes in the sense of preliminary entries, at other times in the sense of final entries, and again in the sense of the proceedings as a whole.

In Error to the District Court of the United States for the District of Minnesota.

R. W. Stewart (John F. Hughes, on the brief), for plaintiff in error.

Charles C. Houpt, U. S. Atty. (Joel M. Dickey, Asst. U. S. Atty., on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. Royal B. Stearns, with another, was convicted in the District Court of a conspiracy to defraud the United States, a crime denounced by section 5440, Rev. St. as amended May 17, 1879, 21 Stat. 4, c. 8 [U. S. Comp. St. 1901, p. 3676], which reads:

"If two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment, for not more than two years or to both fine and imprisonment in the discretion of the court."

The indictment charges the conspiracy in this way:

"The said Royal B. Stearns and William T. Horsnell did then and there unlawfully, wrongfully, feloniously, and knowingly conspire, combine, confederate, and agree together to defraud the United States of the title and possession of certain lands of the said United States, of great value, under the homestead laws of the said United States, by means of false, feigned, forged, fraudulent, and fictitious entries of said lands under the homestead laws of the United States, which said lands were then and there situate in the state and district of South Dakota, and in the district of lands subject to entry under the homestead laws of the United States at the local land offices of the United States, in the Pierre land district and in the Chamberlain land district, both of said land districts then and there being in the state and district of South Dakota."

And it then charges with much particularity the doing of several acts to effect the object of the conspiracy, the substance thereof being that the defendants caused to be presented and filed in said local land offices certain described homestead applications accompanied by certain affidavits, which purported to have been subscribed and sworn to by bona fide homestead applicants in conformity with the homestead laws of the United States and the regulations of the General Land Office, but which, as was well known to the defendants, were false, forged, and fraudulent in this: They had not been subscribed or sworn to before the officer whose jurat was thereto attached, and were not made by bona fide homestead applicants. This part of the indictment fully describes the specific lands embraced in these applications, and states that they were "public lands of the United States, subject to homestead entry," at said land offices.

Before the trial the sufficiency of the indictment was not questioned in any way, but after verdict it was challenged by a motion in arrest

Digitized by Google

of judgment, the denial of which is assigned as error. The contention is that the indictment charges a conspiracy to defraud the United States of the title and possession of some of its lands by means of fraudulent homestead entries, without charging that the lands were public lands, subject to homestead entry, and that it is therefore fatally defective, first, as not showing that the object of the conspiracy could be effected by the means stated, and, second, as not enabling the accused to prepare their defense, because leaving it uncertain whether they would be confronted at the trial with proof that the conspiracy related only to public lands, subject to homestead entry, or extended to other lands of the United States, not public or subject to homestead entry, such as post office sites, military reservations, and the like.

Lands of the United States, which are used as post office sites, military reservations, and the like, are not within the operation of the public land laws, and no attempt to make entries of them in the land offices can be effective for any purpose, because the land officers have no authority to dispose of them. Wilcox v. McConnell, 13 Pet. (U. S.) 498, 513, 10 L. Ed. 264; Scott v. Carew, 196 U. S. 100, 109, 25 Sup. Ct. 193, 49 L. Ed. 403; Burfenning v. Chicago, etc., Co., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; Smelting Co. v. Kemp, 104 U. S. 636, 641, 26 L. Ed. 875. So long and firmly has this been settled, and so generally is it recognized throughout the public land states and territories, that when mention is there made of entries in the land offices it is immediately understood, if nothing be said to the contrary, that they relate to lands which are subject to disposition in some form under the public land laws, and not to those which are set apart and used for some special public purpose. True, the former, when there is occasion to distinguish them from the latter, are usually spoken of as "public lands" (Barker v. Harvey, 181 U. S. 481, 490, 21 Sup. Ct. 690, 45 L. Ed. 963; Northern Lumber Co. v. O'Brien, 71 C. C. A. 598, 139 Fed. 614), but this is not essential if the meaning be otherwise plain. Leavenworth, etc., Co., v. United States, 92 U. S. 733, 23 L. Ed. 634.

Not all public lands are subject to homestead entry, but it does not follow that attempts to make homestead entries of such as are excepted from that mode of disposal are never effective. When the exception turns upon a question of fact, such as whether the lands contain valuable coal or mineral deposits, the determination of which is committed to the land officers and must rest upon proofs outside the records, it is always possible for applicants, by making false proofs, to impose upon these officers, and secure the allowance by them of homestead entries of lands of the excepted class. Of course such entries are fraudulent, but, being allowed in the exercise of a lawful authority, they are not void, but voidable merely, and may be the means of defrauding the United States. Burfenning v. Chicago, etc., Co., supra; United States v. Mackintosh, 29 C. C. A. 176, 85 Fed. 333; United States v. Minor, 114 U. S. 233, 240, 5 Sup. Ct. 836, 29 L. Ed. 110; Steele v. Smelting Co., 106 U. S. 447, 453, 1 Sup. Ct. 389, 27 L. Ed. 226; United States v. Winona, etc., Co., 15 C. C. A. 96, 103, 67 Fed. 948; Parsons v. Venzke, 164 U. S. 89, 92, 17 Sup. Ct. 27, 41 L. Ed. 360; In re John O'Dea, 6 Land Dec. Dep. Int. 819. And they may

Digitized by Google

also be fraudulent for other reasons, applicable to all original homestead entries, as where they are made in pursuance of collusive agreements by the applicants to give to others the benefit thereof, or are made by persons who falsely represent themselves as possessing the requisite qualifications when they do not possess them.

We are aware that there is persuasive authority for the position, taken by the learned judge who presided at the trial, that under section 5440 the means of effecting the object of the conspiracy do not constitute an element of the offense and need not be stated in the indictment, or, if stated, need not be so fully described or so supplemented by the statement of other matters as to make their adequacy apparent. United States v. Dustin, 25 Fed. Cas. 944, No. 15,011; United States v. Dennee, 25 Fed. Cas. 818, No. 14,948; United States v. Gordon (D. C.) 22 Fed. 250; United States v. Benson, 17 C. C. A. 293, 298, 70 Fed. 591, 596; Gantt v. United States, 47 C. C. A. 210, 108 Fed. 61. See, also, United States v. Cruickshank, 92 U. S. 542, 558, 23 L. Ed. 588; Pettibone v. United States, 148 U. S. 197, 203, 13 Sup. Ct. 542, 37 L. Ed. 419; Dealy v. United States, 152 U. S. 539, 544, 14 Sup. Ct. 680, 38 L. Ed. 545. But as in the present case the result must be the same whether this position be correct or otherwise, and as its correctness was neither affirmed nor denied in argument, we deem its consideration at this time unnecessary.

With these preliminary observations, some of which will serve to avoid any misapprehension of what is here decided, we proceed to consider the objections made to the indictment. The act of conspiring, the purpose to defraud the United States of the title and possession of certain of its lands, and the doing of several acts to effect this purpose are all directly and plainly stated. And in like manner it is stated that the unlawful purpose was to be effected under color of the homestead law, by means of false, forged, and fraudulent homestead entries. This, without more, strongly implies that the conspiracy had in view lands which were public and possible of acquisition through such entries. But the matter is not left to implication merely. It is further stated that the lands were "in the district of lands subject to entry under the homestead laws of the United States" at designated local land offices, a permissible meaning of which is that the lands were part of those which were subject to homestead entry at these land offices. And that this is what was intended is apparent when the statement of the overt acts is examined, for it is there said that "to effect the object of such conspiracy" the accused caused certain homestead applications to be made at these land offices for specific "public lands of the United States, subject to homestead entry" thereat. We recognize that a charge of conspiracy under section 5440, which wholly omits some essential element of the offense, cannot be aided by the statement of acts done to effect its object (United States v. Britton, 108 U. S. 199, 205, 2 Sup. Ct. 531, 27 L. Ed. 698), but this does not prevent reference to such statement for the purpose of ascertaining the sense in which terms are used in charging the conspiracy. Dealy v. United States, 152 U. S. 539, 545, 14 Sup. Ct. 680, 38 L. Ed. 545.

Our conclusion is that the indictment, although susceptible of improvement, makes it clear to the common understanding that the

Digitized by Google

conspiracy had in view public lands which were possible of acquisition by means of homestead entries, and that the accused, attended by counsel as they were, could not reasonably have understood it otherwise. But if it were conceded that the indictment does not make it altogether clear to what lands the conspiracy related—which is the most that is claimed—the defect would not be available on motion in arrest of judgment. As was said by Mr. Justice Brewer in Dunbar v. United States, 156 U. S. 185, 192, 15 Sup. Ct. 325, 39 L. Ed. 390:

"While it may be true that a defendant by waiting until that time [after verdict] does not waive the objection that some substantial element of the crime is omitted, yet he does waive all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn. If, for instance, the description of the property does not so clearly identify it as to enable him to prepare his defense, he should raise the question by some preliminary motion, or perhaps by a demand for a bill of particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise property in respect to which he is charged to have violated the law."

It follows that the motion in arrest of judgment was rightly denied.

At the close of the government's case in chief the accused requested the court to direct a verdict of acquittal, advancing as reasons therefor that the indictment would not sustain a conviction, and that the evidence was not sufficient to take the case to the jury. The request was denied, and error is assigned thereon. It is not usual to question the sufficiency of an indictment in this way, and is not admissible, save for a defect which would be fatal on motion in arrest of judgment, all others being waived, if advantage thereof be not taken in advance of the trial. As has been shown, the indictment was sufficient as against a motion in arrest. In so far as the request questioned the sufficiency of the evidence, it was waived by the action of the accused in subsequently proceeding to offer evidence in their own behalf. Burton v. United States, 73 C. C. A. 243, 142 Fed. 57; School District v. Chapman, 152 Fed. 887, 82 C. C. A. 35.

The matter which next claims our attention is an objection to a portion of the court's charge to the jury. As a preliminary to its statement and consideration it will be well to recite briefly the facts which the evidence tended to establish. Certain ranchmen and stockgrowers were maintaining unlawful inclosures of public lands in the Pierre and Chamberlain land districts in South Dakota, were apprehensive that they would be required to remove their inclosures by proceedings under the act of February 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524], and had solicited the defendant Stearns to devise some plan which would enable them to maintain their exclusive use and occupancy of the lands inclosed. Stearns was a land locator at Pierre, S. D., and the defendant Horsnell was conducting an employment office at St. Paul, Minn. At the latter place the defendants entered into this arrangement: Horsnell, upon inducements to be offered by him, was to secure homestead applications, homestead and nonmineral affidavits, and also five-year leases, to be signed in blank by persons visiting his office, and was to transmit these papers to Stearns, who was to insert therein descriptions of public lands so unlawfully inclosed; was to secure false certificates from some officer,

Digitized by Google

authorized to administer such oaths, that the affidavits were subscribed and sworn to in his presence by those whose names were signed to them; was to present the applications and affidavits, as so perfected in form, at the local land offices and secure the allowance thereon of preliminary homestead entries; and was then to deliver the leases, with the blanks suitably filled in, to those who had the lands unlawfully inclosed. The purpose in this was, not to initiate and secure lawful homestead entries on behalf of bona fide applicants, but to enable those who had the lands unlawfully inclosed to continue in the exclusive use and occupancy of them, as against the United States and the public, during the five-year period prescribed for earning title under the homestead law. Many acts, including those specified in the indictment, were done by one or both of the defendants to effect this purpose. Whether or not it was also the purpose that the preliminary entries should be carried to final entry and patent for the benefit of the defendants, or the ranchmen and stockgrowers in whose behalf they were acting, was the subject of conflicting evidence.

The court, in effect, instructed the jury that, if the charge was otherwise established, it was within the statute, even though the purpose was confined to defrauding the United States of the possession of the lands by means of fraudulent homestead entries, and did not include the acquisition of the title. This, it is urged, was error, because, first, the United States could not be defrauded of the possession by anything short of what would pass the title; second, its possession of public lands is theoretical only and not a thing of value; and, third, the indictment, in charging the conspiracy, uses the word "entries" only in the sense of final entries. We cannot assent to these contentions.

The homestead law plainly confers the right of possession upon the entryman when the preliminary entry is made, for it makes actual settlement, followed by residence and cultivation for a period of five years, a condition to obtaining the title, and requires the applicant to make and file, with the application for the entry, an affidavit "that he or she will faithfully and honestly endeavor to comply with all the requirements of the law as to settlement, residence, and cultivation necessary to acquire title to the land applied for." Rev. St. § 2290; Act March 3, 1891, c. 561, § 5, 26 Stat. 1095 [U. S. Comp. St. 1901, p. 1389]; Rev. St. § 2291 [U. S. Comp. St. 1901, p. 1390]; Shiver v. United States, 159 U. S. 491, 497, 16 Sup. Ct. 54, 40 L. Ed. 231; Peyton v. Desmond, 63 C. C. A. 651, 662, 129 Fed. 1, 12. But the right to the possession, like the right to make the entry, is extended only to those who intend to earn the title by faithfully and honestly complying with the law. To secure the entry by feigning such an intention is to secure it fraudulently, and to then use it as a mere cover for obtaining or prolonging an unlawful possession is to defraud the United States of the possession.

While the government pursues a liberal policy in respect of its public lands, and requires that they shall remain open in order that settlement and entry thereof under the general land laws may not be discouraged or impeded, and that such as are adapted to grazing purposes may be freely accessible to all (Act Feb. 25, 1885, c. 149, 23 Stat.

Digitized by Google

321 [U. S. Comp. St. 1901, p. 1524]; Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618; Camfield v. United States, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260), it does not thereby surrender its possession of them, or render it of no value. On the contrary, this is but an exercise of its right of possession in a manner deemed of advantage to it in the proper execution of the general land laws, and in the accomplishment of the purposes which prompted their enactment.

In statutes and in common parlance the word "entries," when applied to proceedings in the land offices under the homestead law, is used with various meanings—sometimes in the sense of preliminary entries, at other times in the sense of final entries, and again in the sense of the proceedings as a whole. In this indictment it is evidently used in the sense of the proceedings as a whole, because it refers to that whereby the possession and the title are acquired, and so embraces preliminary entries.

We find no error in the record, and the judgment is accordingly affirmed.

(152 Fed. 907.)

CUNNINGHAM v. CITY OF CLEVELAND, TENN., et al.

(Circuit Court of Appeals, Sixth Circuit. March 24, 1907.)

No. 1,586.

1. MUNICIPAL CORPORATIONS—JUDGMENT AGAINST CORPORATION—MISAPPLICATION OF REVENUE.

Where a city is given by statute authority to borrow money for the erection of public buildings and to issue its bonds therefor, it has not the right to use its current revenues for that purpose as against a judgment creditor, whose judgment is payable only from the surplus of such revenues above current expenses.

[Ed. Note.—Constitutional and statutory limitations of municipal indebtedness, see note to City of Helena v. Mills, 36 C. C. A. 6.]

2. SAME—ENFORCEMENT OF JUDGMENT—MANDAMUS.

A writ of mandamus requiring a city to levy taxes for municipal purposes to the full amount permitted by statute, and to apply the surplus remaining after paying current expenses chargeable thereon in payment of a judgment against it, is continuous in its operation, and the court may modify its order from time to time to meet the exigencies of the case. It may bring in as parties officers elected after its order was made, and, while it cannot control their discretion if honestly exercised, it may exercise a supervisory power over their acts so far as necessary to insure an observance of its mandate in good faith.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Frank Spurlock, for plaintiff in error.

J. B. Sizer, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This cause is now here for the fourth time. On the first occasion, it was brought up on an appeal by the complainant from a decree of the Circuit Court dismissing the bill. The decree was reversed, with directions to enter a decree for the

Digitized by Google

complainant for the full amount claimed by the bill, with interest and costs. The decision of this court was of the date of December 9, 1899. The facts of the case and the opinion of the court were reported in 98 Fed. 657, 39 C. C. A. 211. Pursuant to the mandate, on April 11, 1900, a decree was entered in the Circuit Court in favor of the complainant for the sum of $9,852.12 and costs. Execution was issued thereon and returned nulla bona. On July 11, 1900, the complainant filed a petition in the Circuit Court praying for a mandamus to compel the city to levy and collect a sufficient tax and therewith to satisfy the decree. To an alternative writ the city returned that it had already assessed a tax for that year of 75 cents on each $100 for the maintenance of its municipal functions, that this assessment was the limit of its power of taxation under its charter, and that no surplus would remain after applying the amount assessed to the necessities of the city government. The complainant demurred to this return, and the demurrer was sustained; the court being of opinion that the city had the power, and it was its duty, to levy a special tax, notwithstanding the limitation of 75 cents on the $100, which the court thought was a limitation upon its power to tax for ordinary municipal purposes. The court was further of opinion that the return was insufficient in that it failed to state the purposes for which the general tax had been levied. A judgment was entered in accordance with this opinion, and the defendant sued out a writ of error to this court. It was here held upon consideration of the relevant provisions of the city's charter that the Circuit Court was in error in holding that the aforesaid limitation did not exclude the power to levy a special tax to satisfy the decree; and we reversed the judgment. But on doing this we indicated to the Circuit Court our opinion in respect to the judgment which that court should enter. The case, as then presented, and the opinion of this court, are reported in 111 Fed. 341, 49 C. C. A. 383. As the judgment which we then indicated as the proper one was made the judgment of the Circuit Court upon the reception of the mandate, and was, and still continues to be, the guide for subsequent proceedings, we here set forth a copy of so much thereof as is now material:

"That the defendant below be directed to pay over any surplus which may remain from the proceeds of the total levy made for all purposes in 1900, after defraying the current expenses chargeable upon the ordinary revenue of the city, and that it make a further return showing the amount of the tax so collected, and how same has been applied. That the defendants below be commanded to levy for each year succeeding the entry of this judgment the full tax of 75 cents on the $100 of assessable city property, and the full poll and privilege taxes permitted by the charter of 1893, until the judgment of relator, with interest and costs, shall be fully paid; and, after defraying all ordinary expenses payable out of the revenue so raised each year, it will pay over to the relator any surplus remaining each year, until his judgment shall be paid, and that it make all such other returns as shall be required by the court below, showing how it has obeyed this judgment."

After the Circuit Court had entered the judgment we directed, the city made a further return as therein required, and evidence relating to the matters stated in said return was taken before a master as in equity proceedings; but the relator had taken no issues either of fact or law

Digitized by Google

upon the return. The master did not report the evidence, but stated his own conclusions of the state of the city's finances, reached by him with the assistance of an accountant. Upon his report of the sum which ought to be in the treasury for the satisfaction of the decree exceptions were filed, which being overruled the court ordered that the defendant pay into court within 20 days the sum of $5,631.19 to be applied upon the decree. Upon a writ of error, because no issues had been made and for other irregularities, in consequence of which we were unable to review the proceedings to any purpose, the order was reversed and the cause remanded, with instructions to permit a further return, to require the relator to demur or plead, or take exception thereto as he might elect, and to take further proceedings in conformity with the opinion which we filed. The report of the case on that writ of error is to be found in 127 Fed. 667, 62 C. C. A. 393. These directions being entered in the Circuit Court, the city made a further return showing the revenues it had collected and the disbursements it had made for the years 1900, 1901, 1902, and 1903, respectively, and the parties pleaded to issue thereon, and the relator also filed exceptions to the return. The case was finally submitted upon the return, the exceptions thereto, and certain agreed facts. The court overruled all the exceptions, and adjudged the return to be sufficient, and that the relator pay the costs of the proceeding. The case is now here upon a writ of error to reverse that judgment.

We take the facts as we gather them from the return of the city and the agreed statements. The return for the year 1900 shows that taxes to the amount of 75 cents on the $100 of the valuation were collected. It also shows that the whole amount thus collected was disbursed, but that no part was applied to the relator's decree. The exceptions of the relator to the disbursements of that year challenge the following items: An item of $250 paid to attorneys for services rendered in 1899. It does not appear at what time in 1900 this item was paid; nor is it important, as we think, to fix the precise date. The petition for mandamus, filed in July of that year, did not seek to impound the general taxes for 1900, or any part of them. It was filed for the purpose of compelling a special levy to satisfy the decree, and that was what the Circuit Court ordered. Until the date of the judgment of this court, which was October 8, 1901, there was no order or judgment which interfered with the power of the city to pay any valid obligation. The order then made could only apply, so far as the revenues of that year were concerned, to any surplus arising from the collections of that year which still remained in the treasury. The same observations apply to the second exception, which is to the disbursement in that year of $843.70 to pay a note given for a rock-crusher, and to the third exception, to the payment of $533.40 due on a judgment against the city for attorney fees. It is not charged that any of these three items were not valid obligations of the city.

The return for 1901 shows that taxes to the full amount of 75 cents on the $100 were collected, that they were all disbursed, but none to the relator. Among the disbursements was an item of $2,125 for the purpose of building an addition to a public school building, and this disbursement formed the subject of the relator's fourth exception.

Digitized by Google

The date in 1901 when this item was disbursed, as is the case with all the items of disbursements in this and the previous year, is not shown. If it was paid before October 8, 1901, it was not within the scope of the judgment of this court of that date, and for the reason above stated in regard to previous exceptions no order of the court was pending which forbade the disbursement, and the city or its officials would not be in contempt for making it. The burden was on the relator to prove that it was after that date in order to bring the respondent under the operation of the order. We are not to be understood as saying that the particular disbursements above mentioned and now challenged by the relator were made with due regard to his rights. We only say that upon this writ and the order thereon directed by this court in October, 1901, the court was restricted to the limits of the writ and order. We make these observations respecting the disbursements challenged with a qualification which we propose to consider here, though it relates as well to the exception following, which has regard to another disbursement of $2,548.85 made during the year 1902 for another addition to the school building. We preface what we are now to say with the statement that in 1902 the full amount of 75 cents on $100 was levied and collected and disbursed without any relief to the relator. And so of 1903. Counsel for the relator contends that these appropriations for additions to the school building were not justified as against him for the reason that section 21 of the charter authorized the city to borrow money and issue its bonds therefor to erect public buildings, and that it was its duty to avail itself of that power, if it had not enough to pay its other obligations falling due. We are strongly inclined to think this point is well taken. It seems probable that the Legislature contemplated just such a situation as this as likely to happen. The building of such large structures would necessarily involve the use of large sums of money, several times larger than the municipality was authorized to raise for its current annual expenses, which for those purposes were meager enough already. It is true it was a grant of authority, and it may be said that a discretion existed. But, if the city owed an honest debt which it could not otherwise pay, it would seem to be due to the owner of that debt that the discretion should be exercised in his favor. Supervisors v. United States, 4 Wall. 435, 18 L. Ed. 419; City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560; Deere v. Commissioners, infra. During the years 1901 and 1902, the city disbursed for these new buildings $4,673 out of funds which were raised for ordinary expenses, and therefore applicable to the debt due the relator, if not necessary for current use. We think he had a lawful right to expect this, and that if, after paying its ordinary expenses, it should have no funds to erect school buildings, the city should exercise its power under the statute providing for raising funds for that purpose, if, indeed, there was a real necessity. It was not a case where the city would have to appropriate its ordinary revenues to erect school buildings or go without. No such necessity could be appealed to in order to justify the city in withholding from the relator the debt due him and defeating his just expectation that the city would in good faith exercise its powers in such a way as to pay him. When we speak of the city, we mean to include the

Digitized by Google

officials who, from time to time, represented it in the levying and collecting its taxes and appropriating its revenues.

We are therefore of opinion that the Circuit Court erred in holding that the return was sufficient, and specifically in regard to the disbursement of $2,548.85 for school buildings in 1902, and in so far its judgment should be reversed, with directions to adjudge the return insufficient in the regard mentioned. And it is authorized, if it shall be so advised, to order a more specific return as to the time when the disbursement of the $2,125 for school buildings was made in 1901, and, if it shall appear that it was made after the 8th day of October of that year, the said return in that respect should be judged insufficient. The costs of the proceeding were erroneously adjudged to be paid by relator. The relator was entitled to a return to the writ. The circumstances justified him in pursuing his remedy, and, as above indicated, we think the court erred in holding the return sufficient, and that the relator should have been awarded costs.

The return made for the year 1903 shows that the full 75 cents on each $100 was levied and collected and disbursed by the city, and that nothing has been paid to the relator. It also shows that there was a "cash balance in the hands of the city treasurer for 1903" of $722.61. Nothing is said about this in the judgment of the court below; and, from the fact that no error is assigned because the court did not order it to be paid over, we do not concern ourselves with it. There is no assignment of error in dealing with the return for 1903, except as it may be indirectly involved in the assignments presently to be noticed. Apparently that surplus would be paid to the relator.

The other assignments of error seem to be intended to raise two questions of an interesting character, of which one is whether the act of the Legislature of Tennessee of 1895 which transfers the duty of valuing the property of the city for assessing taxes from the recorder of the city to the county assessor, who makes, under that act, a single valuation for state, county, and municipal purposes, impaired the obligation of the city in respect of his contract, which was of earlier date. Under the then existing law the recorder valued the property in the city only, and he was by the statute required to value it at its true cash value. This the relator was entitled to have done, and he might probably have compelled the recorder to make such a valuation. In Deere v. Board of County Com'rs (C. C.) 33 Fed. 823, it was held by Mr. Justice Brewer, then Circuit Judge, that, where at the date of the obligation the commissioners were authorized in their discretion to levy a poll tax to meet the obligations of the county, a mandamus might properly be issued to compel them to do so, notwithstanding their authority to levy poll taxes had since been taken away by a law of the state; the case being one where a judgment creditor could not be satisfied by other methods of taxation. By the act of 1895 the valuation is to be made by an officer who is not an officer of the city, but one who, when he values property, values it not only for city purposes, but for those of the state and county, and he could not be compelled to make a valuation for the former without also doing it for the latter. In normal circumstances the mere transfer of such a duty from one officer to another would not impair any contract obliga-

Digitized by Google

tion. But here the difficulty, as pointed out by the relator, is that the county assessor values property, and has been during recent years valuing the property in this city, at only 70 per cent. of its true cash value. The result is that 30 per cent. of value cannot be taxed for city purposes at all. Nor has he any available remedy as he would have if the recorder of the city were charged with the duty. A valuation of the latter would be made for city purposes only, and compulsory process would be adapted to its proper purpose. But a valuation by the county assessor of the property in the city could not be made by him at its true cash value without drawing upon it an unequal burden of state and county taxes, unequal as respects the state taxes with all other property in the state, and as regards the county taxes with the other property in the county. Apparently the result would be to effect an inequality of taxation which is forbidden by the Constitution of the state and affect the legality of taxation elsewhere. See Taylor v. Louisville & N. R. Co., 88 Fed. 537, 31 C. C. A. 537. But we are prevented from expressing a definite opinion upon the question thus presented by the fact that there is no adequate foundation laid in pleading and procedure for invoking the judgment of the court upon it.

The other question is whether the court might compel the city to make a distinct levy of 75 cents on each $100 of the 30 per cent. of valuation which has not been taxed, and apply this to the payment of the judgment. But here we have the same difficulty. The conditions required for awarding this special relief are not found in anything which the relator has done or asked in the requisite legal form of procedure.

The judgment of the court below will be reversed, with costs, and the cause remanded with directions to enter a judgment for the relator as indicated in the foregoing opinion.

We have thought it necessary to review the order of the Circuit Court which adjudged the return sufficient, and to reverse the same to the extent that we hold the order erroneous, lest the order might conclude the relator in any subsequent proceeding he might be advised to take against the board or the individuals composing the same for a breach of duty in respect of the levying and appropriation of taxes which should have been applied to the payment of his debt. In saying this, however, we are not to be understood as expressing any opinion as to whether such a remedy is open to the relator or not.

When, on October 8, 1901, we directed the order hereinbefore in part recited, we assumed that the board of mayor and aldermen of the city, its duties being defined, would in good faith proceed to exercise its legitimate powers so as to provide for the payment of the relator's judgment. It is now complained that it has acted in bad faith, and has industriously so shaped its conduct as to exclude the relator from the relief due to him. We do not need to express an opinion upon that subject. There is, however, an aspect of the case which we should not ignore. The court below expressed the opinion that whatever the fault of the board in respect of the appropriation of the taxes levied in previous years, inasmuch as those taxes had been already disbursed and could not now be reached, and the membership of the board had been changed so that other persons now composed it, the court was

Digitized by Google

without power to remedy the mischief. And counsel for the defendant lays stress upon these conditions and urges the impossibility of the relator's obtaining any relief for former conduct of the board, as matters now stand. It cannot be denied that there is much force in these objections. The court may not order what is impossible, and it should not visit upon an innocent party the consequences of another's fault. But the writ is of continuous operation and the order of the court is subject to such amendments as the exigencies of the case may from time to time require. It may bring in new parties, and it may reform its requirements so long as the substantial object of the proceeding remains the same and is not yet accomplished. And, in view of subsequent events, we think the court below, if it should be so moved, should, and it is permitted to, amend the order directed by this court in October, 1901, so as to bring in said board as a respondent in this proceeding, and to require the said board in each year to seasonably estimate what sums are required for the ordinary expenses of the city for that year, and for what particular expenses and in what amounts such sums are required, and what sum it proposes to levy for the payment of the relator's judgment; and forthwith, upon the making such determinations, make report to the Circuit Court in which this cause is pending, stating fully and particularly the several sums and for what several purposes it has determined to levy and collect taxes during that year, and in such form, and to the end, that the court may fully understand whether its mandate is being observed; and the Circuit Court is directed, as soon as practicable after receiving such report, to review the same and ascertain whether its order is being obeyed, and, if it shall be of opinion that it is not, and that the conduct of the board is not taken in good faith toward the relator, then to make such specific order and direction as shall require the said board to so modify its previous determination as to conform to the determination of the court. So long as the board acts lawfully and in good faith, its discretion cannot be supervised by the court. But it cannot, under the guise of its discretion, be permitted to accomplish an unlawful purpose. And the court below is directed to give notice to said board of the amendment of the former order directed by this court, in case such amendment shall be made, and of the further requirements herein directed, which notice the said board will file for its information in each subsequent year. It is proper to say that, in the foregoing direction in regard to making the board a respondent in the process, it is not to be inferred that we think it is not so already in legal contemplation. Our purpose is to relieve any doubt which the board might entertain in regard to its relation to the proceeding.

Order reversed, with directions as herein indicated.

Digitized by Google

(152 Fed. 914.)

OTIS STEEL CO. v. WINGLE.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1907.)

No. 1,614.

1. MASTER AND SERVANT—NEGLIGENCE—INJURIES TO THIRD PERSON.

Plaintiff, a servant of an independent contractor, went to defendant's mill for the purpose of hauling certain steel plates for defendant. The plates were uniformly loaded on the wagons by two movable cranes, which operated simultaneously and placed the plates on the wagon in the position indicated by the driver. Plaintiff took a position on one side of the front wheels of the wagon, and directed defendant's servant in charge of the cranes to move them forward a trifle in order to drop the plates in the correct position on the wagon. The front crane was started forward by defendant's servant in charge of it without waiting to see that the other was also moving, which resulted in pulling out the front hook and permitting the plates to swing toward plaintiff and strike him, before he could escape. *Held*, that defendant was actionably negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1217–1225.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff was not, also, negligent as matter of law in standing in the position taken by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1274.]

3. SAME—FELLOW SERVANTS—SERVANT OF INDEPENDENT CONTRACTOR.

Plaintiff was the driver of one of several teams owned by his father, who hauled steel plates for defendant as an independent contractor. The driver of another wagon had placed the same to receive plates which were lowered by two overhead cranes, and requested plaintiff to superintend the placing of the plates in position on his wagon. Plaintiff directed the cranes to be moved slightly ahead, when defendant's servant in charge of one of the cranes moved it forward before the other crane was started, which resulted in plaintiff's injury. *Held*, that plaintiff was not a fellow servant for the time being of the crane operator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 482.

Who are fellow servants, see note to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

The defendant in error, a teamster, while engaged in taking on a load of steel plates at the mill of the plaintiff in error, sustained an injury from the slipping of a bundle of suspended plates out of the hooks, and lost a leg. Michael Wingle, the father of the defendant in error, Francis Wingle, owned a number of teams, and did hauling as an independent contractor. The Otis Steel Company, makers of steel plates, had a contract with him to do such hauling for them as they should be unable to do with their own facilities, at a fixed price per ton. Upon the occasion in question, two of his wagons had been sent to the steel mill to receive loads. One of these wagons was driven by a teamster named John Nuss; the other was driven by the defendant in error. But one wagon could be loaded at the same time, and the wagon of Nuss was first backed into the mill and placed in position for loading. The plates to be hauled were about 25 feet in length and 4 feet wide. It was the business of the Otis Company to place these plates upon the wagons in such position as the teamster might indicate as best for their safe carriage. To carry these plates to the loading platform and place them on the wagons, two overhead cranes were used, moving independently, but in unison, and operated by

Digitized by Google

the servants of the company. To lift and move these plates there was attached to each crane a set of hooks connected with the cranes by means of a chain. These plates were only about one-half inch thick, and a bundle of seven or eight were customarily carried at one time for loading. One set of hooks would be attached to the forward end of the plates, and the other set to the other end. When the hooks were thus attached, the plates could be securely lifted and moved into position over the wagon; but to do so without danger of their slipping out of the hooks it was essential that the cranes should be operated together. On the day when Francis Wingle was hurt, a usual number of plates had been brought from the rear of the mill to the wagon and were suspended over the wagon driven by Nuss and there stopped. Nuss was inexperienced in loading, and at this stage he called on defendant in error, who was outside the mill with his own team, to come in and show him how to proceed with the loading. He came in accordingly, passed by Nuss' horses, and took a place on one side of the front wheels of his wagon. Seeing from the position of the suspended plates that, if lowered then on the Nuss wagon, they would rest too far back on the wagon and be liable to slide off while being hauled, he called out to the boys in charge of the cranes, "Come ahead, boys," and motioned with his hand. The front crane was started forward by the boy in charge of it, without waiting to see that the other was also moving. The result was that the plates did not move, but the front hook, on the side of the plaintiff below, pulled out. The plates were at this moment suspended 1½ or 2 feet above the wagon, and were prevented from falling on the wagon by the hook on the opposite side of the front end, so that they were caused to swing toward plaintiff and slide to one side, catching him before he could get out of the way.

D. H. Tilden, for plaintiff in error.

F. M. Cobb and R. B. Newcomb, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, delivered the opinion of the court, after making the foregoing statement of the case.

The court below instructed the jury that Wingle was not the fellow servant of the boys operating the cranes, and that the negligent act of moving one crane in advance of the other, thereby causing the plates to slip out of the hooks attached to the forward crane, was one for which the Otis Steel Company was responsible. The question as to whether the defendant in error had contributed to his own injury by standing unnecessarily in a place of danger, he submitted under proper instructions to the jury. There was a verdict and a judgment for the plaintiff. It is now insisted that the court erred in instructing the jury that the defendant below was guilty of negligence, and in not instructing them, as requested, to find for the plaintiff in error.

That there was negligence in failing to move these two cranes forward at the same moment is demonstrable. The effect of moving one before the other would be to leave the plates in their suspended position over the wagon, and would, inevitably, pull the forward hooks or one of them loose and cause the plates to slide, as they did, to one side. It was therefore not error to say that the movement of the forward crane by the servant of the plaintiff in error, without seeing that the other crane was started at the same time, was negligence. Neither was Wingle the fellow servant of the man operating the crane. Wingle was the servant of his own employer, who was an independent contractor. It was the business of the plaintiff in error to place the plates in such position upon the wagon as should be indicated

Digitized by Google

by the driver. If, in doing this, it was done negligently, it was the actionable negligence of the Otis Steel Company. But it is said that, in respect to this particular transaction of loading this wagon with these plates, the plaintiff became for the time the servant of the Otis Company, and those in charge of the cranes his fellow servants. The fact that Wingle was the general servant of his father would not, as matter of law, prevent him becoming the particular servant of the Otis Company. That he was employed and paid only by his father would not preclude his becoming ad hoc the servant of the plaintiff in error in a particular transaction. Powell v. Construction Co., 88 Tenn. 692, 701, 13 S. W. 691, 17 Am. St. Rep. 925; Byrne v. K. C., etc., Ry. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693. In Powell v. Construction Co., cited above, it was said that:

"The better test would seem to be: Was he, in regard to the particular matter in which he was employed, doing the work of a general master, or was he engaged in doing the work of another, over whom the general master had no control?"

It was undoubtedly the business of the driver of the wagon being loaded to indicate the position of the plates on his wagon in which they might be most safely and advantageously carried. But it was the business of the Otis Steel Company to place the plates upon the wagon in such position as should be indicated. Plainly there was no lending of the cranes and the men operating them to Wingle, the hauling contractor, or his drivers, for it was not the business of Wingle to load the plates. Neither was there any lending of the driver to the Otis Company for the purpose of assisting that company in its duty. Each had a distinct duty to perform, and Wingle's did not begin until the loading was finished. The only direction he gave, or had a right to give, was to move the cranes forward slightly, and this because, if the plates were dropped from the hooks at the point where the movement of the cranes had been stopped, they would not ride well on the wagon. The simple giving of a direction or a signal for the cranes to move forward a little, that the load might be better placed, was no transfer to the service of the Otis Steel Company, but a proper discharge of his duty as the servant of the owner of the team, to see that the loading was properly done by the Otis Company. In obeying the signal to move forward, the operator was acting only as the general servant of the Otis Company. The duty to comply was a duty imposed by his contract of general hiring, and not by reason of any authority the driver had or any which he could enforce. The Otis Company undertook to move the plates into proper position for carriage, and it was its duty to obey the signals of the driver indicating when the plates were in proper position on the wagon. The circumstances of the case bring it quite within the principles applied in The Lisnacrieve (D. C.) 87 Fed. 570, McGough v. Ropner (D. C.) 87 Fed. 534, and The Slingsby, 120 Fed. 748, 57 C. C. A. 52, where stevedores were injured by the negligence of a servant of the ship in operating a winch, although the winchman operated the winch by direction or signal from the stevedore. The carriage cases of Quarman v. Burnett, 6 M. & W. 499, Jones v. Liverpool, 14 Q. B. D. 890, and Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed.

Digitized by Google

652, are also in point. In those cases it was held that one who hires a hack or cab with a driver is not responsible for the driver's acts of negligence, where he assumes no further control than to tell him where to drive, or stop, or start. The negligence of the plaintiff in error was so demonstrable upon the undisputed facts of the case that there was no question for submission to the jury, and the court was quite within its authority when it instructed the jury to that effect. "When but one inference can be reasonably drawn from the evidence, the question of negligence or no negligence is one of law for the court." District of Columbia v. Moulton, 182 U. S. 579, 21 Sup. Ct. 840, 45 L. Ed. 1237.

Neither did the court err in submitting the question of contributory negligence to the jury. The weight of evidence did establish that it was usual for the driver of a wagon receiving a load of steel plate to stand between his horses, upon the wagon tongue. This was, doubtless, due to the fact that he would be out of the way, and, in case they should slip or fall, be in a reasonably safe place and in a position to control his horses and guide the plates by his hand, if necessary. Nuss, the driver of this wagon, was at the time on the wagon tongue, and escaped injury. Wingle stood on the ground, not under the suspended plates, as seems to have been the theory of counsel, but out upon one side of the front wheels. If the plates had fallen, they would not have hit him. One hook slipped. The plates were slued around toward and slid sideways against him before he could get away. The inference of negligence or no negligence in standing where he did is not so plain and indisputable as to become a question of law. The facts of the case bring it within the rule applied by this court in Erie R. R. Co. v. Moore, 108 Fed. 986, 46 C. C. A. 683, Michigan Headlining & Hoop Co. v. Wheeler, 141 Fed. 61, 72 C. C. A. 71, and Taggart v. Republic Iron & Steel Co., 141 Fed. 910, 73 C. C. A. 144.

Judgment affirmed.

(152 Fed. 917.)

SOUTHERN RY. CO. v. POWER FUEL CO.

(Circuit Court of Appeals, Fourth Circuit. April 10, 1907.)

No. 681.

1. RAILROADS—FIRES.

Civ. Code S. C. 1902, § 2135, provides that every railroad corporation shall be responsible in damages to any person or corporation whose building or other property shall be injured by fire communicated by its locomotive engines or originating within the limits of the railroad's right of way in consequence of the act of any of its authorized agents or employés. *Held*, that where a fire was started by the negligence of the subboss of a railroad bridge and trestle crew, while using a boarding car as a place to sleep during the night, when he was not on duty, he was neither an agent nor employé of defendant within such section, and hence the company was not liable for the result of his acts thereunder.

2. MASTER AND SERVANT—ACTS OF SERVANT—LIABILITY OF MASTER.

Where a fire was negligently set by a railroad's subboss of a bridge and trestle crew, while he was sleeping in one of the railroad's boarding cars, when not on duty, his act was not performed in the business of the

Digitized by Google

railroad company. Hence the latter was not liable for the result thereof at common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1225.]

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

C. P. Sanders (Sanders & De Pass, on the briefs), for plaintiff in error.

Stanyarne Wilson (J. A. Sawyer, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. This was an action at law brought by the defendant in error—to be hereafter referred to as the plaintiff—against the plaintiff in error, to recover damages for the injury to the stock, equipment, and buildings of the plaintiff at Union, S. C., from fire which originated in a boarding car belonging to the defendant.

It appears that the defendant had a work train for the use of one of its bridge and trestle crews, consisting of a car used as a cooking and dining place, a sleeping car for the two white members of the crew, a sleeping car for the negro members, and one or more cars for timber and tools. For a considerable time prior to the fire, which occurred about 11 o'clock on the night of October 22, 1904, this construction train had been placed at night after coming in from work on a short spur track close to the premises of the plaintiff. This spur track belonged to the Union & Glenn Springs Railroad Company; but it is abundantly shown that the defendant was authorized to use it for the purpose above mentioned. The foreman of the crew was a white man by the name of Pope. The only other white member of the crew was one Ayres, who died some time after the fire and prior to the trial. During the forenoon of the day preceding the fire Pope quit work and left the crew under the charge of Ayres. After the day's work was finished Ayres had his supper in the dining car, and then went into the town. He returned about 8 o'clock, and went to bed in the white sleeping car in the bed regularly used by him. In this car there was a portable kerosene lamp, provided by the defendant for the use of the occupants of the car. When this car was in motion, the lamp was usually placed in a wall bracket. On the night of the fire the lamp was on a table very near the foot of the bed used by Ayres. About 11 o'clock of that night the negro cook was awakened by cries of fire, and, on making his way into the sleeping car where Ayres was, he found the car filled with kerosene smoke and the bed and bedding ablaze. There is much evidence tending to show that Ayres, who at this juncture was standing at the window of the car, making no effort to subdue the fire, was very drunk. The alarm quickly brought numerous people to the scene, and the evidence of nearly every one who saw Ayres indicates that he was drunk. In fact, the cook appears to have found it necessary to bodily carry him from the burning car. The result of the fire was the destruction of

Digitized by Google

several of the cars and of the property of the plaintiff. It appears that Pope, the foreman, and McClurkin, the cook, were employed by the month. The remaining members of the crew, including Ayres, were paid monthly at a fixed rate per day, according to the number of days of work. Ayres was in some sense a "subboss." During working hours, in the absence of Pope, he had charge of the crew. There was some evidence tending to show that at night, Pope being absent, the negro members of the crew regarded Ayres as having charge of the work train. But all of the evidence was to the effect that after work hours Ayres was a "free man." He could sleep in the car or not as he saw fit, and it was clearly shown that he returned to the car merely in order to go to bed. Since 6 o'clock that afternoon he had done no work whatever, and had none to do until the following morning at least. At the time the fire started he was in no sense engaged in performing any duty for the defendant.

The complaint is drafted under 1 Civ. Code S. C. 1902, § 2135, and also contains as a second cause of action a charge that the injury was the result of the negligence of the defendant. The statute referred to reads as follows:

"Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees, except in any case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and shall have an insurable interest in property upon its route for which it could be so held responsible and may procure insurance thereon in its own behalf."

The assignments of error, in so far as they are now material, are based on the refusal of the trial court to direct a verdict and on the refusal to give certain instructions based on the theory that Ayres was not in the employment of the defendant at night after working hours. We regard the language of the statute, "its authorized agents" as being, so far as we are now concerned, synonymous with "employés." There was evidence tending to show that Ayres was drunk and also evidence tending to show that he in some way turned the lamp over. The one question for discussion is whether or not Ayres was at the time the fire was started an employé within the meaning of the statute.

So far as we are advised the Supreme Court of South Carolina has never ascribed to this statute any purpose other than to relieve one complaining of injury from fire originating on a railroad company's right of way of the necessity of proving negligence. Thompson v. Railway Co., 24 S. C. 369. It seems to have been repeatedly held by that court that this statute is to be strictly construed. Rogers v. Railroad Co., 31 S. C. 378, 9 S. E. 1059; Hunter v. Railroad Co., 41 S. C. 86, 19 S. E. 197; Lipfield v. Railroad Co., 41 S. C. 285, 19 S. E. 497. In 1 Sherman & Redfield Negligence, § 147, it is said:

"In determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act is done while the servant is at liberty from service and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility, even though

Digitized by Google

the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master."

See, also, 1 Thompson, Negligence (Last Ed.) § 526; 20 Am. & Eng. Ency. (2d Ed.) 168; Morier v. Railway Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793, and authorities there cited. We cannot in reason ascribe to the Legislature in enacting this statute an intent to make the railroad companies liable for the acts of their employés when not on duty and when not engaged in the performance of some business of the master's. In the case at bar Ayres was not on duty. He was not performing any business of his employers. He was simply making use of facilities allowed him by the defendant for his own purposes. We hold that his act was not, within the intent of the statute, the act of an employé.

From the fact that Ayres was not engaged in performing any duty as an employé, it also follows that the defendant is not liable under the common-law cause of action. We are therefore constrained to hold that the learned trial court was in error in refusing to direct a verdict for the defendant.

Reversed.

PRITCHARD, Circuit Judge. I concur in the conclusion reached, but not in the reasons assigned.

The complaint contains two causes of action, the first being based on the provisions of the 1 Civ. Code S. C. 1902, § 2135, as follows:

"Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees, except in case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and shall have an insurable interest in the property upon its route for which it could be so held responsible, and may procure insurance thereon in its own behalf."

In order to enable plaintiff to recover on the first cause of action, it is not necessary, as at common law, to show that the injury was caused by the negligence of the defendant company, but it must be shown by competent proof that the fire occurred by the act of an authorized agent or employé of the company. It would not be sufficient to simply show that a fire occurred on the right of way or premises of the company. Plaintiff was not only required to show how the fire originated, but was also required to show that the damage was caused by the act of an authorized agent or employé. Circumstances which barely create a suspicion as to how the fire may have occurred are not sufficient.

In the case of Manning v. Insurance Co., 100 U. S. 698, 25 L. Ed. 761, the court, among other things, said:

"We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences of facts proved."

Digitized by Google

It cannot be reasonably insisted from the evidence that the fire originated from the act of Ayres. It was shown by uncontradicted evidence that immediately after the fire occurred Ayres said he "did not know whether it was a lamp exploded or not." He was the only person who could have had knowledge as to the origin of the fire, and he stated positively that he did not know how it occurred. It appearing that he did not know how it occurred, it would be unreasonable to say that the jury could infer from the circumstances that the fire was caused by the acts of an employé or authorized agent of the defendant company.

There is considerable conflict of testimony as to whether Ayres was at any time the authorized agent of the defendant company; it being insisted by the plaintiff in error that at the time the fire occurred that he was not in the employment of the company, his employment being such that, when his duties ended for the day, he was no longer responsible to the company and simply occupied the position of any other laborer, and therefore could not be deemed to be either an authorized agent or employé of the defendant company. However, the testimony of the witness Wm. McClurkin is to the effect that Ayres was a subforeman. He also testified that the night the fire occurred Pope was absent, and that Ayres was left in charge of the cars, and that he was acting as the representative of the company at the time the accident occurred. In my opinion it was not error in submitting this evidence to the jury as bearing upon the question as to whether Ayres was the authorized agent or employé of the company. The evidence was such as to raise an issue about which reasonable men might reasonably differ, and under these circumstances, as I understand the rule, it was the duty of the presiding judge to submit the same to the jury for their consideration. But I do not deem this phase of the question important, inasmuch as there was not sufficient evidence as to the origin or cause of the fire to warrant the jury in arriving at the conclusion that the acts of an authorized agent or employé of the company caused the same.

The facts and circumstances offered in evidence as to how the fire occurred are purely conjectural. According to the evidence, the fire may have originated by an explosion of the lamp or it may have originated by the lamp having been overturned by some one, but as to the particular manner of its origin there is not a single circumstance from which the jury could have inferred that it was caused by the acts of an authorized agent or by an employé of the plaintiff in error. There are many ways by which the fire could have originated from a kerosene lamp. It is a historical fact that the great Chicago fire was caused by a cow kicking over a kerosene lamp, and in that instance it was an easy matter to determine how the fire originated. The evidence of the milkmaid who was present at the time the fire originated showed conclusively that the cow kicked over the lamp, but in the case at bar the only person present stated immediately after the accident that he did not know whether it was the lamp exploded or not, which can only be interpreted to mean that it was not due to any act of his, and, although he was present, he did not know the real cause of the fire.

Digitized by Google

The second cause of action is at common law, and in considering the same it would be necessary to determine whether the alleged damage was caused by the negligence of the defendant company, its agents, or employés, but it is not necessary to consider this phase of the case, inasmuch as I am of opinion that there was not sufficient evidence to entitle the plaintiff to recover on the first cause of action.

For the reasons hereinbefore stated, I think the judgment of the Circuit Court should be reversed.

(152 Fed. 922.)

PALATINE INS. CO., LIMITED, OF MANCHESTER, ENG., v. O'BRIEN.

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907.)

No. 697.

INSURANCE—ADJUSTMENT OF LOSS—ARBITRATION—AWARD.

Plaintiff owned three buildings, two of which she insured in defendant company against loss by fire, and also procured from defendant a policy insuring the rents of all the buildings. The buildings having been totally destroyed by fire, arbitrators were appointed, and awarded plaintiff three months' rent on all the buildings, and $3,835.56 on the two buildings insured. No date was set in the award from which the three months was to run, nor did the award specify the monthly rent which was to be allowed, whereupon defendant construed the award to entitle plaintiff to three months' rent from the date of the award, and paid into court what it claimed to amount to the rent for five months, together with the additional loss on the buildings. *Held*, that such award was fatally defective for uncertainty as to the amount allowed for the rent, and, this being inseparable from the balance, the whole award was void.

Appeal from the Circuit Court of the United States for the District of Maryland.

John J. Donaldson (Daniel H. Hayne on the brief), for appellant.

Hyland P. Stewart, for appellee.

Before PRITCHARD, Circuit Judge, and WADDILL and McDOWELL, District Judges.

McDOWELL, District Judge. The appellee, complainant below, owned three buildings in Baltimore, known as 4, 6, and 8 East German street. She insured with the appellant the two buildings, 4 and 6 East German street, in the sum of $6,000 against loss or injury by fire. She was also insured by the same company against loss of rents by fire on the said two buildings in the sum of $1,800, and had a similar policy against loss of rents of the building known as No. 8 East German street in the sum of $1,040. In both the rent policies it is stipulated:

> "Loss to be computed from the date of the fire and to cease upon the premises again becoming tenantable."

The three buildings were totally destroyed in the great Baltimore fire of February, 1904.

On March 25, 1904, the parties entered into an agreement which so far as is now material reads as follows:

Digitized by Google

"It is hereby agreed by estate of Thomas J. O'Brien, of the first part, and the Palatine Insurance Company of Manchester, of the second part, that J. J. Walsh and Henry Z. Niblett (together with a third person to be chosen by them in advance, to decide only upon matters of difference between them), shall estimate and appraise at the actual cash value the loss and damage caused by fire on the 7th day of February, 1904, to the property belonging to building and rents as specified below, or in the accompanying schedule, which estimate and appraisement by them, or any two of them in writing as to the amount of such loss and damage, shall be binding on both parties hereto, it being understood that this appointment and submission is without reference to any other questions or matters of difference between the terms and conditions of the insurance and is of binding effect only so far as regards the actual cash value of and the loss and damage to said property."

And then follows the substance of the three policies.

An umpire appears to have been agreed upon, but he was not called upon to act.

On March 30, 1904, the appraisers made the following award:

We, the undersigned, have carefully estimated and appraised the actual cash value of and damage to the property of ———. In conformity with the foregoing appointment and declaration, we hereby report that we have determined the actual cash value of any loss and damage thereon to be as follows:

Time required to erect buildings complete as follows:

	Cash Value.	Loss and Damage.
No. 8 E. German St.	3 months	
" 4 & 6 E. German St.	3 months	
Loss on Bldg. 4 & 6 E. German St.	$3,835.56	$3,835.56
Total	$3,835.56	$3,835.56

Witness our hands at Baltimore this 30th day of March, 1904.

[Signed] J. J. Walsh,
Henry Z. Niblett,
Appraisers.

After learning of the nature of the award, and feeling aggrieved thereby, the appellee declined to abide by it, and instituted an action at law in the state court for a recovery on the insurance policies. As a defense to this action, the insurance company pleaded the submission and award, and paid into court as the damages to the two buildings the sum of $3,835.56, with interest and costs. As a compliance with the award under the two rent policies, the defendant also paid five months' rent, with interest and costs, alleging the rent on the two buildings insured by appellant to have been $230 per month, and the rent on the remaining building to have been $85 per month. Thereupon appellee filed her bill in equity in the state court, praying that the award be set aside, and that the insurance company be restrained from using the award as a defense to the action at law. The equity suit was removed to the federal court, and after an amended bill had been filed the appellee answered. Replication was filed, evidence was taken, and the trial court set aside the award and enjoined the insurance company from setting it up in defense. There are many other facts in the record which, in view of the conclusion reached by us, need not be here stated. It appears that one of the results of the fire was that the city authorities of Baltimore refused to grant permits for rebuilding for a considerable time after the fire.

Digitized by Google

We shall first consider that part of the award which relates to loss of rents. In this respect the award fixes no sum of money, but merely finds a loss of rents for a period of three months. It is argued that this award is sufficiently certain as it is a mere matter of calculation to ascertain the sum intended to be awarded. Inasmuch as the parties had not agreed what the rent was, and as it may not have been a money rent, it seems clear that an award in this form leaves open to dispute a possible ground of contention. How the insurance company learned the rentals to be $230 and $85 per month does not appear. So far as we can learn these figures may not be correct. However, we need not base our conclusion on this point alone. In another respect the award as to the rents is wholly uncertain. The policies specify that the loss of rents insured against is from the date of the fire, and the policies are incorporated in the submission. Whether the appraisers intended to allow a sum equal to the rent for a period of three months from the date of the fire, or from the date of the award, is left entirely uncertain. In making its payment into court, the award having been made nearly two months after the fire, the insurance company construed the award as meaning three months after the award. In view of the continued refusal of the city authorities to allow rebuilding, and the fact that nearly two months of loss of rents had occurred when the award was made, such construction was necessary to relieve the award of gross unfairness to the appellee. But we are entirely unable to say that this is what the arbitrators intended.

It is contended that this feature of the award is separable from the part of the award fixing the loss under the policy insuring the two buildings which were insured by the appellant, and that the invalidity of the part of the award relating to loss of rents does not affect the remainder. We cannot accede to the correctness of this contention. In Russell on Arbitration, p. 316, it is said:

> "Though before the time of King James the First, according to Holt, C. J., an award void in part was considered void altogether (a) it is now quite clear that an award bad in part may often be good for the rest. If, notwithstanding some portion of the award is clearly void, the remaining part contained a final and certain determination of every question submitted, the valid portion may frequently be maintained as the award, though the void part be rejected."

See, also, Morse on Arbitration, pp. 454, 455; 3 Cyc. 713, and authorities cited; 2 Am. & Eng. Ency. (2d Ed.), 741, 742, and authorities cited.

The matter submitted here was the total damage to the appellee by the fire. The purpose of the parties in submitting this matter to the appraisers was to avoid controversy and litigation. To sustain in part an award which is void for uncertainty as to a very considerable part of the matter submitted is in effect to make and enforce a contract which the parties did not make, and one which they doubtless would not have been willing to make. The award does not respond to the submission. It leaves undetermined, and hence open to controversy and litigation, an important part of the matter submitted. It is not, on its face, a final settlement of the matter submitted, it is not the award the parties authorized, and it does not accomplish the purpose intended.

Digitized by Google

Again, we are wholly unable to say that the appraisers would have agreed on the sum awarded as loss on the buildings, had the appraisers known that their award as to the loss of rents was invalid. While the appraisers did in their award separate the two items, it does not follow that either item of allowance was arrived at independently. For instance, assuming for the present that both appraisers intended the loss of rents to be three months after the award, or five months all told, it may be that Walsh regarded the sum fixed upon as loss on the buildings as too small, but agreed to it, because he thought five months' rent loss more than appellee was entitled to claim. In McCormick v. Gray, 13 How. (U. S.) 27, 39, 14 L. Ed. 36, it is said:

"There are cases in which, after rejecting part of an award, the residue is sufficiently final, certain, and in conformity with the submission to stand; but it is indispensable that the part thus allowed to stand should appear to be in no way affected by the departure from the submission."

From every standpoint we are satisfied that the award here cannot be sustained in part and set aside in part.

It follows that the decree of the trial court must be affirmed.

WADDILL, District Judge (concurring). I concur in the affirmance of the decision of the lower court for the reasons given above, and, moreover, because I think it sufficiently appears in the record that the award sought to be set aside was but the action and judgment of a single, instead of both arbitrators. The purpose of the arbitration was to ascertain the loss under certain policies of insurance arising by reason of the destruction of the insured premises by fire. The buildings were totally destroyed. Only one of the arbitrators was familiar with and saw the buildings, and knew of their value before the fire. Nevertheless, they undertook without proof of any sort before them, or any opportunity afforded the assured to furnish proof, to ascertain the loss sustained by her. Such an award was but the finding of a single arbitrator, instead of two, as required under the agreement of submission, which provided for the action of both, and, in case of disagreement, an umpire was to be called in to decide the question in dispute.

(152 Fed. 925.)

OLD NICK WILLIAMS CO. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 12, 1907.)

No. 709.

1. CRIMINAL LAW—WRIT OF ERROR—TIME OF TAKING EXTENSION.
   The six months granted by Act Cong. March 3, 1891, c. 517, § 11, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552], within which a writ of error may be taken in a criminal case, cannot be extended.

2. SAME—COMMENCEMENT OF PERIOD.
   The time within which accused may sue out a writ of error begins to run from the date judgment was entered.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2697.]

Digitized by Google

3. SAME—ASSIGNMENT OF ERROR—BILL OF EXCEPTIONS.

Rev. St. § 997 [U. S. Comp. St. 1901, p. 712], providing that an assignment of errors shall be annexed to and returned with a writ of error, does not necessitate the settlement of a bill of exceptions prior to the filing of the writ and the assignment of errors.

4. SAME—EFFECT—TIME.

A writ of error sued out by accused does not become effective until deposited with the clerk of the trial court.

5. SAME—ENLARGEMENT OF TIME.

Where a writ of error sued out by accused is filed in time, the time for complying with it may be enlarged by proper orders.

6. SAME—NUNC PRO TUNC ORDER.

Where delay in suing out a writ of error was the act of accused, it could not be cured by a nunc pro tunc order.

In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro.

On motion to dismiss.

Charles A. Moore and William P. Bynum, Jr. (E. T. Cansler, Thomas Settle, and J. E. Alexander, on the brief), for plaintiff in error.

A. E. Holton, U. S. Atty.

Before PRITCHARD, Circuit Judge, and MORRIS and DAYTON, District Judges.

MORRIS, District Judge. This is a motion to dismiss the writ of error because not sued out within six months after the entry of the judgment.

It arises in the case of an indictment against the Old Nick Williams Company, a corporation which was authorized to carry on the business of a rectifier, and which by the verdict of a jury was convicted of violating the second paragraph of section 3317 of the Revised Statutes [U. S. Comp. St. 1901, p. 2164], being found guilty of carrying on the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified by it. On November 28, 1905, the jury rendered its verdict, and on the same day the defendant moved in arrest of judgment, which motion was overruled. The defendant then moved to set aside the verdict and for a new trial, which motion was also overruled. The attorney for the United States then prayed the judgment of the court, and on the same day, November 28, 1905, the court entered its judgment by which it sentenced the defendant to pay a fine of $5,000 and be taxed with the costs.

It thus appears from the record that the judgment was entered November 28, 1905. On the same day it was ordered that the defendant have ninety days to prepare its bill of exceptions and that the attorney for the United States have 30 days after being served with the defendant's bill of exceptions to prepare any objections thereto, and that the court would settle the bill of exceptions upon 10 days' notice to the attorneys of the parties, and, when filed, the bill of exceptions should be deemed as made in apt time. Afterwards, January 17, 1906, by consent of the parties, the court by its order further extended the time for preparing and filing the defendant's bill of exceptions to

Digitized by Google

March 15, 1906, and afterwards, in like manner, the time was extended to April 1, 1906. On July 27, 1906, the court over the objection and protest of the attorney for the United States made an order which recited that the defendant had filed with the clerk its bill of exceptions to which the attorney for the United States had filed certain objections and proposed amendments, so that the bill of exceptions had not been settled and signed by the court within six months from the date of the entry of the judgment, and, the court being of opinion that the defendant was entitled under the circumstances to have the bill of exceptions settled and a writ of error and citation issued and served nunc pro tunc as within the time required by law to procure a review of the judgment, the said order of the court directed that the attorneys should appear before him at Greensboro on August 7, 1906, to have the bill of exceptions settled and signed by the court, and further ordered that, when the bill of exceptions was settled and signed and after a petition for a writ of error and assignments of error had been filed by the defendant, a writ of error and citation in due form should be issued and served, all to bear date as of the 15th April, 1906, said date being the date on which the defendant filed its proposed bill of exceptions with the clerk and which was within six months from the entry of the judgment. Thereafter, on September 12, 1906, the defendant having presented its petition for the allowance of the writ of error and its assignment of errors, the court signed an order allowing the writ of error, and directed that the writ of error and citation when issued bear date April 15, 1906, as theretofore ordered by the court. Thereupon the writ of error was issued on September 12, 1906, as of April 15, 1906, as ordered by the trial judge. The attorney for the United States now moves to dismiss the writ of error because not sued out within six months after the entry of the judgment.

The statute restricting the time for writs of error in such cases is section 11, Act Cong. March 3, 1891, c. 517, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552], and reads:

"Sec. 11. That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of Appeals, under the provisions of this act, shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed."

It has been so frequently and so uniformly decided that the limit of time after the entry of the judgment for the issuing of writs of error admits of no extension that the rule is now firmly established.

In Brooks v. Norris, 11 How. 204, 13 L. Ed. 665, the Supreme Court said:

"The writ of error is not brought in the legal meaning of the term until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly. The day on which the writ may have been issued by the clerk or the day on which it is tested are not material in deciding the question."

In Polleys v. Black River Co., 113 U. S. 81, 5 Sup. Ct. 369, 28 L. Ed. 938, it was held that the plaintiff in error had a right to his writ

Digitized by Google

on the day the judgment was entered and on that day the time within which his right existed began to run. Scarborough v. Pargoud, 108 U. S. 567, 2 Sup. Ct. 877, 27 L. Ed. 824; U. S. v. Baxter, 51 Fed. 624, 2 C. C. A. 410; Stevens v. Clark, 62 Fed. 321, 10 C. C. A. 379.

In Credit Co. v. Ark. Cent. Ry., 128 U. S. 258–261, 9 Sup. Ct. 107, 32 L. Ed. 448, it was held that, although the appeal had been allowed and the bond for costs approved and the citation signed by a Supreme Court justice within the time prescribed by law, yet because the papers were not filed with the clerk until five days after the time expired, the appeal was too late. The court said:

"The attempt made in this case to anticipate the actual time of presenting and filing the appeal by entering an order nunc pro tunc does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

In Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246, it was held that a cross-appeal in equity, like other appeals, must be entered within the time limited, calculating from the date of the decree, and because in that case the petition, order, and bond were not filed in the Circuit Court until after the lapse of two years from the entry of the decree the cross-appeal was dismissed. It was held in the same case that the failure to file an assignment of errors, although required by the act of Congress and the rule of court, was not jurisdictional, and might be waived. City of Waxahachie v. Coler, 92 Fed. 284, 34 C. C. A. 349; City of Wilmington v. Ricaud, 90 Fed. 212, 32 C. C. A. 578; Threadgill v. Platt (C. C.) 71 Fed. 1.

In the present case reliance is placed by the plaintiff in error upon the alleged fact that the delay in settling the bill of exceptions was not the fault of the plaintiff in error, but was attributable to the judicial engagements of the trial judge, and it is argued that, until the bill of exceptions was settled, counsel for the plaintiff in error could not intelligently prepare the assignment of errors which should accompany the petition for a writ of error. Rev. St. § 997 [U. S. Comp. St. 1901, p. 712]. But it is not a fact that the assignment of errors requires the previous settlement of the bill of exceptions. The exceptions are noted during the progress of the trial, and are known to the counsel for the plaintiff in error, and this notation is, in fact, the basis upon which the bills of exceptions are prepared. The assignment of errors can be formulated before the settling at length of the formal bills of exception. It does not follow, because Rev. St. § 997, provides that there shall be annexed to and returned with the writ of error an assignment of errors, that the bill of exceptions must be first settled. The bill of exceptions must be settled as provided for by the rules and practice of the court, or the time may be enlarged by orders of court specially entered in particular cases. In the case of Waldron v. Waldron, 156 U. S. 361, 15 Sup. Ct. 383, 39 L. Ed. 453, the judgment was entered July 10, 1890, and the writ of error was dated July 15, 1890, but the bill of exceptions by consent of the parties was not settled during the term, and because of subsequent delays was not settled until February, 1891, yet the Supreme Court held it to be in time because done by an agreement of the parties made during the term.

Digitized by Google

But this is not so with regard to writs of error. The writ of error is the writ of the appellate court addressed to the judge of the trial court, directing him to send the record and proceedings in the case to the appellate court, and, when deposited with the clerk of the trial court, it is served, but not before. After the writ is so filed, the time for complying with it may, by proper orders, be enlarged. Missina v. Cavazos, 6 Wall. 355, 18 L. Ed. 810. "A writ of error is the process of this court, and it is issued therefore only upon our authority." Brown v. McConnell, 124 U. S. 489, 490, 8 Sup. Ct. 559, 31 L. Ed. 495. In School District v. Hall, 106 U. S. 428, 1 Sup. Ct. 417, 27 L. Ed. 237, it was held that a writ of error will not be dismissed as for want of jurisdiction by reason of a failure to return therewith an assignment of errors. The assignment of errors is not a jurisdictional requirement, although it is true that by rule 11 (90 Fed. cxlvi, 31 C. C. A. cxlvi) errors not assigned will be disregarded, still the court may at its option notice a plain error not assigned or specified.

It appears to us that the delay in the present case in taking out the writ of error was not the act of the court, but of the plaintiff in error (Sage v. Central R. R. Co., 93 U. S. 412–417, 23 L. Ed. 933), and in such a case a nunc pro tunc order cannot be made effectual. The case of Kingman v. Western Mfg. Co., 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192, cited by the plaintiff in error, is merely to the effect that in a case where a motion for a new trial is pending the limitation of time does not begin to run until the motion for new trial has been overruled, for the reason that until the court has acted on the motion for a new trial, filed in due time, the judgment is not final, but is still under the control of the trial court and not ripe for invoking the jurisdiction of the appellate court. The case of In re Chateaugay Ore & Iron Co., 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508, also cited by the plaintiff in error, treats only of the time within which a bill of exceptions may be properly settled and not of writs of error.

We feel ourselves reluctantly constrained to hold that we are without jurisdiction to examine the alleged errors, for the reason that the writ of error was not sued out within six months from the entry of the judgment.

Writ of error dismissed.

(152 Fed. 929.)

PORTLAND CHEMICAL & PHOSPHATE CO. et al. v. BLODGETT.

(Circuit Court of Appeals, Fifth Circuit. April 9, 1907.)

No. 1,640.

VENDOR AND PURCHASER—VENDOR'S LIEN—CONSTRUCTION OF CONTRACT.

By one of three separate instruments, executed on the same day, complainant conveyed certain real estate to an individual; the latter, by the second, conveyed it to a corporation, while, by the third, which was between complainant and such corporation, said conveyances were recited, and provision was made for deferred payments of the purchase money. Each provided expressly that the grantee should not sell or incumber the property during the ensuing five years, which was the time given by the third for payment of the purchase money in full. The instruments each described the property, and were so executed as to be entitled to record,

Digitized by Google

and all were recorded in the county where the land was situated. The purchasing corporation, after having made the first of the deferred payments, was adjudicated a bankrupt, and its interest in the property was sold by its trustee subject to all valid existing liens; the purchaser having actual notice of one at least of said instruments. *Held*, that they were to be construed as a single instrument, and gave the complainant a lien upon the property for the unpaid purchase money which was enforceable in equity as against the purchaser.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

Previous to the 1st of July, 1902, negotiations had been carried on between Warren K. Blodgett, who was the president of the Albion Chemical & Export Company, a Maine corporation, with the plaintiff, the Portland Chemical & Phosphate Company, also a Maine corporation. These negotiations ripened into three instruments of writing, each bearing date the 1st of July, 1902, and that day finally agreed upon between the phosphate company, party of the first part, and Warren K. Blodgett, party of the second part, by one of which the phosphate company, party of the first part, "does grant, bargain, sell and convey unto the said Warren K. Blodgett, the said party of the second part, and his heirs and assigns forever, all those certain lots, tracts and parcels of land." etc., describing the premises here involved, with limitations not here material, and continuing: "It is agreed between the parties hereto that the party of the second part shall not, nor shall his heirs, representatives or assigns, during the five years next ensuing from and after the date of this deed, make any sale, deed, or conveyance of the within granted premises or any part thereof, without in either case the express assent thereto in writing of the said party of the second part being had and obtained."

By another of the three instruments just referred to, Warren K. Blodgett, as party of the first part, conveyed the premises to the Albion Chemical & Export Company, party of the second part, in which this provision occurs: "It is agreed between the parties hereto that the party of the second part shall not, during the five years next ensuing from and after the date of this deed, make any sale, deed or conveyance of the within granted premises, or any part thereof, or make or suffer any incumbrance, mortgage or lien of any nature whatsoever upon the within granted premises, or any part thereof, without in either case the express assent thereto in writing of the said Portland Chemical & Phosphate Company being first had and obtained, in accordance with a provision in the deed of said company to me, of even date herewith, to which reference is hereby made."

The other of the instruments referred to, as far as material, is as follows: "Agreement made this the 1st day of July, A. D. 1902, between the Albion Chemical & Export Company, a corporation organized under the laws of the state of Maine, of the first part, and the Portland Chemical and Phosphate Company, a corporation organized under the laws of the state of Maine, of the second part.

"Whereas, the party of the second part has this day sold to Warren K. Blodgett, of Cambridge, Massachusetts, who has by his deed this day conveyed to the said party of the first part, the following lands lying and being in Levy and Alachua counties, Florida, to wit [here the premises are described], upon the following conditions and terms, to wit, for the sum of one hundred thousand dollars; thirty thousand dollars thereof to be paid in cash, and the sum of seventy thousand dollars, the balance of said purchase money, to be paid as follows: One dollar per ton upon each and every ton of phosphate rock mined upon and sold from said land, either by the said party of the first part or its representatives or successors, said payments to be made annually at the end of each and every year from this date to the party of the second part, or until the said sum of $70,000.00 shall be fully paid, and the mining of said phosphate rock is to begin within five months from this date and at least 14,000 tons of such rock to be mined and sold and the sum of $14,000, paid each and every year until the said sum of $70,000.00 is fully paid, and no conveyance, mortgage, bonds, liens or other incumbrances of any

Digitized by Google

kind is to be made or placed of or upon said lands so conveyed, either by the said party of the first part or its representatives or successors until the said sum of $70,000.00 is fully paid.

"Now, therefore, this agreement witnesseth that the said party of the first part, in consideration of the premises and of one dollar to it in hand paid by the party of the second part, doth hereby agree, promise and bind itself and its successors, that the stipulations and agreements heretofore in this instrument set out shall be strictly performed and the said sums of money fully paid; and further, that it will at the beginning of each and every year, until the final performance of this agreement, give to the party of the second part the promissory note of the party of the first part properly executed, payable in one year from that date without interest, for the amount of fourteen thousand dollars, provided so much still remains due under the terms of this agreement; and further, in the event of the nonpayment of any one of these said notes at their maturity, or any removal of or attempt to remove from said lands, by the said party of the first part, any property, except the phosphate rock mined by it, before said lands are fully paid for, the said party of the first part, for itself and its successors, hereby expressly consents and agrees to an immediate attachment of all of its property, except said phosphate rock, in the state of Florida, by the said party of the second part, for its failure to comply with this its agreement, and expressly agrees that such attachment shall be valid and binding."

These writings were, each and all of them, duly and in due time recorded in the county of Florida, in which the lands described are situated. Of the $100,000, $30,000 thereof, stipulated to be paid in cash, was so paid at the time the negotiations were consummated, and $14,000, which was to become due at the end of a year from that date, was paid, and a note for the second payment, which became due the 1st of July, 1904, was given according to the terms of the agreement; but, before it matured, or anything was paid on it, the maker, the A. Company, was adjudged a bankrupt, leaving a balance of $46,000 of the purchase money unpaid at the time of the adjudication. The petition in bankruptcy against the A. Company was filed in the proper court March 4, 1904. The proper schedules were filed in that court on the 21st of March, 1904. Schedule A (2), creditors holding securities, was as follows:

"Ledger fol.		Value of Securities. $ cts.	Amount of Debts. $ cts.
	.....		
	.....		
14 & 16	Portland Chemical & Phosphate Co., or James Willis Taylor as assignee of this account; Portland, Me., street number unknown. Real estate & plant at Albion, Florida, on which lien is claimed by Portland Chemical & Phosphate Co., under agreement in writing. Boston, Mass., July 1st, 1902.....	Unknown	(14,000 note 42,000 due bill not yet payable.) 56,000.00"

On the 21st of March, 1904, the company was adjudged bankrupt, and such further proceedings were had in the court of bankruptcy that in May, 1904, the trustee in bankruptcy of the estate of the A. Company sold at public sale all his right, title, and interest as such trustee in and to all of the said property, subject to all valid and existing liens and incumbrances, for the sum of $1,050, to Edward E. Blodgett, the defendant, who is a brother of Warren K. Blodgett. The latter part of the year 1905, the plaintiff company filed its bill in the court below against the defendant, the purchaser at the bankrupt sale, setting up substantially all of the above-stated facts, claiming a creditor's lien on the property it had conveyed for the payment of the $56,000 of the purchase money remaining unpaid, for a decree to enforce the lien; and prayed, in the alternative, that in event the court was of opinion that the contract by its own terms created a lien on the property which waived the grantor's lien, then for a decree to enforce that lien by a sale of the property, and from the proceeds

Digitized by Google

of said sale to pay the balance of the purchase money. There were demurrers to the bill, which were overruled. Defendant answered, and the decree from which this appeal is taken recites: "This cause coming on for hearing upon the bill, answer, replication, and testimony taken and filed by the respective parties herein, and the same having been argued by the counsel and considered by the court, it is now ordered, adjudged, and decreed: (1) That the equities of the case are with the defendant, and that the plaintiff, in and by his said bill and testimony taken in support thereof, has not made out such a case as this court, as a court of equity, can grant any relief therein." To reverse that decree this appeal is prosecuted.

H. Bisbee and George C. Bedell, for appellants.

E. C. Maxwell and Lucius J. Reeves, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, having stated the case as above, delivered the opinion of the court.

There is substantially no dispute as to the facts affecting this controversy. There is no room for the application of the doctrine and learning applied to protect an innocent purchaser against a secret lien. The respondent represents, in reference to the issues here presented, the bankrupt debtor, and does not in any sense occupy the position of a creditor. The papers referred to, and as far as material quoted in the statement of the case we have made, present features which require that they should be treated in their construction as one instrument. They show clearly the property which was the subject of the sale, the parties who were the seller and the buyer, the price that was agreed upon, the amount that was paid at the time of the sale, and the amount that remained unpaid. There is no dispute as to the sum that has been paid since, and as to the amount that still remains unpaid. It is therefore a plain case where the plaintiff has parted with its property to the respondent—for, as we have already said, the respondent represents the original purchaser—which the respondent now holds, and for which he has paid not half of the agreed purchase money. The written instruments which evidence the sale were such as by law are entitled to registration in the county and state where the land is situated. They were all duly authenticated for registration and duly registered in due time. With abundant care they provide that the purchaser shall not, during the five years next ensuing after their date, make any sale, deed, or conveyance of the granted premises, or any part thereof, without, in either case, the express assent thereof in writing of the seller. This provision is contained in full force and the clearest expression in each one of the papers, which we construe as a single writing evidencing the transaction between the seller and the buyer. Their due registration gave constructive notice of their material contents to all parties undertaking to deal for or on the credit of the granted premises. Besides this constructive notice, the respondent had actual knowledge of the existence and terms of at least one of the three writings set out in the statement of the case. It seems to us to be wholly immaterial whether technically a vendor's or grantor's lien sprang out of these transactions, or whether the plaintiff's right took the shape of a contract lien. It is plain that, besides the money paid at the time of the sale and the $14,000 paid, it has re-

Digitized by Google

ceived nothing in the way of other security to take the place of its natural right to look to the thing sold for the unpaid part of the purchase price. This appears to us to be so clearly shown on the face of the papers themselves as to exclude room for argument and the citation of authority. In support, however, of the seller's right, under such circumstances, to look to the property sold for the complete satisfaction of the agreed price, we content ourselves with citing Lucas v. Wade, 43 Fla. 419, 31 South. 231; Slide & Spur Gold Mines v. Seymour, 153 U. S. 509, 14 Sup. Ct. 842, 38 L. Ed. 802.

We are of the opinion that the Circuit Court erred in decreeing that the equities of this case are with the defendant, for which error the decree must be reversed.

It is therefore ordered that the decree appealed from is reversed, and the cause is remanded to the Circuit Court, with directions to pass its decree in favor of the complainant therein for the amount remaining unpaid of the purchase money as shown, and decree that the complainant has a valid and subsisting lien on all of the premises described for the satisfaction of its debt, and providing for a foreclosure thereof in manner and terms agreeable to equity.

(152 Fed. 933.)

KINNEAR MFG. CO. v. CARLISLE.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1907.)

No. 1,596.

1. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The decisions of the Supreme Court of a state, as to the common-law liability of a master for injuries caused by the negligence of fellow servants, are not binding on the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 977.

Conclusiveness of judgment between federal and state courts, see note to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 486.]

2. MASTER AND SERVANT—DUTY OF MASTER—PLACE AND APPLIANCES.

The positive, personal, and nondelegable duty of a master to provide a reasonably safe place in which, and reasonably safe appliances with which, to work, or a reasonably safe method of doing the work, is a duty of construction and provision, and not of operation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171-176.]

3. SAME—LIABILITY FOR INJURY OF SERVANT—NEGLIGENCE OF FELLOW SERVANT.

A petition, in an action by a servant against the master to recover damages for a personal injury, does not state a cause of action, where the only negligence alleged is that of a foreman under whom plaintiff was working in directing the manner of using or handling machinery which is not alleged to have been defective or unsafe, if properly used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 469-472.]

4. TRIAL—DIRECTION OF VERDICT—REFUSAL—WAIVER OF EXCEPTION.

An exception to the ruling of the court denying a motion to direct a verdict for defendant, made at the close of plaintiff's evidence, is not waiv-

Digitized by Google

ed, where the defendant does not thereafter introduce any evidence, and a formal announcement that he rests his case is not necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 983.]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

H. B. Arnold, for plaintiff in error.

L. G. Addison, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This was an action by the defendant in error, James H. Carlisle, hereinafter referred to as plaintiff, against the plaintiff in error, hereinafter referred to as defendant, to recover damages for a personal injury sustained October 12, 1903, and consisting in the loss of his left arm. It resulted in a verdict and judgment for $4,500. The case was heard and determined on plaintiff's evidence. At the close thereof defendant moved the court to direct the jury to find for it. This motion was overruled. The ruling was duly excepted to and is assigned as error here. As we hold that this assignment is well taken, it is not necessary to consider any other.

The facts appearing from plaintiff's evidence, are about these:

The defendant was engaged in the business of manufacturing steel doors and shutters at Columbus, Ohio, and plaintiff was its employé. He belonged to the galvanizing department, and his work, in the main, consisted in helping to run sheets of steel through the galvanizing machine. There was another helper besides himself, and a foreman, named Grossman, set over the two. That department consisted of this machine and these three employés. The blacksmith department was in the same room, operated by a blacksmith and helper. The entire plant was in charge of a superintendent, named Volp. When plaintiff was employed by Volp, he placed him in charge of Grossman, and told him that Grossman would tell him what to do. He had been in defendant's employ since the preceding June 16th.

The motive power which ran the galvanizing machine was generated by a gas engine and the connection between the two was made by means of shafts, pulleys, and belts. The work in which plaintiff was engaged when injured was ungearing the machine. They had run out of galvanizing material, and it was necessary to shut the machine down. The custom was when the machine was shut down for any length of time to ungear it. More particularly, he was engaged in trying to hook up the belt by which the power was transmitted from the main shaft to the machine after it had been thrown off the pulley on said shaft upon which it ran. This he was doing by Grossman's direction. It had been so thrown off either by plaintiff with his hand, or with a pole, or by Grossman with a pole. The pulley and shaft were about 10 or 12 feet south of the south end of the machine, and about 10 or 12 feet from the floor. The hook on which he was trying to hook the belt was iron and movable. One end was bent so as to hook on to a gas pipe behind and above the shaft, and the other end was provided with a hook to hook up the belt. It could have been

Digitized by Google

hooked up by removing the hook from the gas pipe, and after inserting the other end therein replacing it thereon. Instead, plaintiff tried to hook it by inserting his left hand within the belt and placing it on the hook. This brought his hand between the belt and the shaft. The shaft was revolving rapidly. He had on gloves and was standing on top of an unsteady stepladder. In making the effort his hand caught upon the shaft, and at once his arm and the belt began to revolve around the shaft and continued so to do until his whole body had been thrown around it twice, his arm had been wrenched from its socket, and he had fallen to the floor.

The accident happened on Monday. This method of disposing of the belt whilst the machine was shut down had been put in operation for the first time the previous Saturday. It was so put by Grossman, the foreman. It had been suggested by the blacksmith's helper, and the blacksmith had made the hook. The belt had been hooked up by Grossman on Saturday, but not in plaintiff's presence. He had not hooked it up or seen it hooked up before the accident. The method of disposing of the belt previous thereto had been this: After it had been thrown from the pulley on the main shaft, it was also thrown from the pulley on the countershaft. It was then taken around the end of the main shaft and hung up in front of it on a piece of wood nailed there. Plaintiff, by Grossman's direction, had hung the belt up in this way at least two or three times. Obviously this method was less dangerous than the other. By throwing the belt off the pulley of the countershaft more play was given to it, and, instead of being hooked up with the revolving shaft within it, it was removed therefrom, and then hung up.

When plaintiff first made the effort to hook up the belt, he found it difficult to do so. He thereupon requested Grossman to throw the belt from the pulley on the countershaft. In response to this request, Grossman caught hold of the stepladder, and said that it was not necessary to do this; that he had hooked it up himself, and to go ahead and hook it up. It was in compliance with this direction that the effort was made which resulted in the injury. Plaintiff, at the time he made it, knew that the shaft was revolving within the belt, and that the removal of the other end thereof from the pulley of the countershaft would make it safer and easier to handle it. It was because of this that he requested its removal.

Such, then, are the facts which appeared from plaintiff's evidence. It is possible that, apart from any other consideration, they were sufficient to require that the case be submitted to the determination of a jury under proper instructions; this, on the ground that the matter of providing a method of disposing of the belt, when thrown from the pulley of the main shaft, was defendant's absolute, positive, personal, and nondelegable duty as master, and it was open for plaintiff reasonably to claim that Grossman had been intrusted by defendant with its performance; that the method provided by him was not reasonably safe, and in providing it he failed to exercise reasonable care; and that he (plaintiff) had not assumed the risk arising from said lack of safety or been guilty of contributory negligence. It is not necessary, however, that we determine this, and by referring to it we are

Digitized by Google

not to be understood as expressing any opinion in regard thereto. The want of necessity for our so doing is due to the fact that such is not plaintiff's case as set forth in his petition. He proceeds upon no such theory therein.

The facts therein alleged are that defendant, through its foreman, Grossman, negligently directed plaintiff to climb up on the stepladder and throw the belt off the pulley while the machine was in motion and connected with the motive power; that after ascending the stepladder he requested the foreman to loosen or unfasten the belt from the opposite pulley so as to enable him to remove the belt in safety; that the defendant, through its foreman, negligently refused to remove the belt from the other pulley and negligently directed him to remove it whilst it (the pulley) and the machine were revolving at such a dangerous rate of speed as to render the removal of the belt highly dangerous to him; and that in attempting to carry the directions out his hand was caught, and the injury complained of sustained. It will be noted that the allegation is that the act that plaintiff was doing when injured was throwing the belt off the pulley whilst the machine was in motion and connected with the motive power. Such, in fact, was not the case. The act that he was then doing was trying to hook the belt up whilst the shaft was revolving within it after it had been thrown from the pulley and the machine stopped. We simply direct attention to this variance without basing our action upon it.

The petition states no cause of action against the defendant. The negligent acts of which it complains are the directions of the foreman, Grossman, to plaintiff, before and after his refusal to throw the belt from the pulley on the countershaft, to throw the belt from the pulley on the main shaft, and that refusal. Such negligence was the negligence of a fellow servant. The fact that Grossman was the superior servant and plaintiff subordinate to him is not sufficient to take the pleaded case out of the fellow-servant rule. Louisville & Nashville R. Co. v. Stuber, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696; Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; Martin v. Atcheson, T. & S. F. R. Co., 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; Alaska Mining Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; Baltimore & Ohio R. Co. v. Brown, 146 Fed. 24, 76 C. C. A. 482. It is true that the Ohio Supreme Court holds otherwise: Little Miami R. Co. v. Steven, 20 Ohio, 415; C. C. & C. R. Co. v. Keasy, 3 Ohio St. 201; P. Ft. W. & C. R. Co. v. Devinny, 17 Ohio St. 198; Railway Co. v. Lewis, 33 Ohio St. 196. And that the doctrine of the Ohio Supreme Court has been embodied to a certain extent in a statute, which is binding upon the federal courts. Railroad Co. v. Camp, 65 Fed. 952; 13 C. C. A. 233; Pierce v. Van Dusen, 78 Fed. 695, 24 C. C. A. 280, 69 L. R. A. 705; Kane v. Erie R. Co., 142 Fed. 683, 73 C. C. A. 672. But this statute is limited to railroad companies, and the position of the Ohio Supreme Court as to the common-law rule is not binding on the federal courts. N. N. & M. V. Ry. Co. v. Howe, 52 Fed. 362, 2 C. C. A. 121. B. & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.

Nor is the case as presented in the petition taken out of the fellow-servant rule on the ground that Grossman's negligence was a breach

Digitized by Google

of the defendant's absolute, positive, personal, and nondelegable duty, as master, to provide a reasonably safe place in which to work, or a reasonably safe appliance with which to work, or a reasonably safe method of doing its work. This duty, as has been pointed out, is a duty of construction and provision, and not of operation.

In the case of Pennsylvania Co. v. Fishback, 123 Fed. 465, 59 C. C. A. 269, in speaking of the matter with reference to railroads, we said:

"So far as safety depends upon the manner of construction and maintenance of the tracks, the duty is upon the railway company to use due care to see that they are reasonably safe. In connection with the operation of trains thereon, it is its duty to use due care to employ an adequate force of hands reasonably competent to operate them, to promulgate adequate rules and regulations for their conduct, and to exercise an adequate supervision over it; but its duty here goes no further. The duty of complying with the rules and regulations and of carefully operating the trains is a duty incumbent upon those employés to whom their operation is intrusted. All employés so engaged are fellow servants, and no recovery can be had against the railway company for an injury sustained by one of such employés due to the negligence of another."

In that case we held that no recovery could be had for a negligent direction of a yard master to an engineer and conductor to take their train over a track on which another train was standing.

In the case of American Bridge Co. v. Seeds, 144 Fed. 605, 75 C. C. A. 407, Judge Sanborn said:

"It is the duty of the master to use ordinary care to furnish reasonably safe machinery and instrumentalities with which his servants may perform their work and a reasonably safe place in which they may render their service, and this duty may not be so delegated by him that he may escape liability for its breach. Nevertheless, this duty has its rational and legal limits. It does not extend to the guarding of the safety of a place or of a machine against its negligent use by the servant. The risks that a safe place will become unsafe, or that safe machinery will become dangerous, by the negligence of the servant who uses them, is one of the ordinary risks of the employment which the servants necessarily assume when they accept it. It is a risk of operation, and not of construction or provision, and the duty to protect place and machinery from dangers arising from the negligence in their use is a duty of the servants who use them, and not that of the master who furnishes them."

In that case a workmen engaged upon the construction of a bridge, whilst returning upon a loose plank from the stringers of the false work of the bridge across an open space between the stringers and rails parallel thereto upon which a traveler ran carrying block and tackle and other machinery, whence he had gone by direction of the foreman to hitch the runner of the tackle to some iron cords, was injured by reason of the foreman giving the man, who operated the block and tackle by means of an engine, a signal to raise the load rapidly and its swinging as it arose against him and the plank and knocking them to the ice below. It was held that no recovery could be had because of the negligence of the foreman. This case is valuable as containing a reference to all relevant authorities and for the clearness and force with which it presents the law.

Here there is no allegation that defendant negligently provided a place in which to work, or an appliance with which to work, or a method of working, that was unreasonably unsafe. The allegations are

Digitized by Google

that through its foreman, Grossman, it negligently directed plaintiff to throw the belt off the pulley of the main shaft, negligently refused to throw it from the pulley of the countershaft after plaintiff requested Grossman so to do, and, after the refusal, directed plaintiff to so throw the belt. The substance of the allegations, therefore, is that, through its said foreman, defendant negligently directed plaintiff to throw the belt from the pulley of the main shaft without its being thrown from the pulley of the countershaft. The allegation that defendant, through Grossman, so did, cannot be construed to mean that it expressly authorized Grossman to give such direction, or that the method provided by defendant for ungearing the machine was as directed by Grossman. It can be construed to mean no more than that Grossman gave such direction, and that it was defendant's act, because of Grossman's superiority over plaintiff. Indeed, it is apparent, from the manner in which plaintiff presented his case before the jury by the evidence, that the theory thereof which he had was that defendant was responsible for Grossman's act, because Volp, when he was employed, put him in charge of Grossman, and told him that Grossman would tell him what to do, a fact of no greater legal significance than the fact that Grossman was superior to plaintiff. This is evident from the fact that it was only upon the cross-examination of plaintiff's witnesses that facts were developed which possibly may reasonably be claimed as tending to show that defendant negligently provided an unreasonably unsafe method of ungearing said machine.

The negligence as alleged in the petition, therefore, was simply the negligence of Grossman in the operation of the machinery provided by defendant, and consequently the negligence of a fellow servant. The fact that defendant had provided a reasonably safe method of ungearing the machine, such, for instance, as was in use before the change made the Saturday preceding the injury, was not inconsistent with any allegation of the petition. The decisions of this court in the cases of Western Union Tel. Co. v. Burgess, 108 Fed. 26, 47 C. C. A. 168; National Steel Co. v. Lowe, 127 Fed. 311, 62 C. C. A. 229, Chambers v. American Tinplate Co., 129 Fed. 561, 64 C. C. A. 129, and National Refining Co. v. Willis, 143 Fed. 107, 74 C. C. A. 301, have no application to the case as presented by the petition. It must be held, then, that the petition did not state a good cause of action against the defendant, and certainly not the possibly good cause of action developed by the evidence, and on this ground defendant was entitled to have the jury directed to return a verdict for it; the defectiveness of the petition being in nowise aided by the answer.

It is urged, however, that the defendant in some way waived its exception to the ruling of the court denying its motion to instruct the jury to find for defendant made at the close of the plaintiff's evidence. It is difficult to make out the exact basis of this position. Decisions such as the following, to wit, Columbia & Puget Sound Ry. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, and Union Pac. Ry. Co. v. Callahan, 161 U. S. 91, 16 Sup. Ct. 493, 40 L. Ed. 628, are cited in support thereof. In those cases it was held that error in overruling the motion for a peremptory instruction made by defendant, at close of plaintiff's testimony, was waived by defendant thereaft-

Digitized by Google

er introducing evidence; but no such thing happened here. Defendant introduced no evidence after its motion was overruled. In the cross-examination of plaintiff's witnesses, they were asked about certain photographs of the place of injury by defendant, and possibly it may be said that they were then introduced in evidence by defendant. It would seem that it is claimed that because these photographs were used by defendant's counsel in argument before the jury at the close of the evidence, a fact, however, not appearing from the record, and subsequently attached to the bill of exceptions, if not made a part of it, this case comes within the above rule. But so using and attaching them as having thus been introduced in evidence was not the introduction of them in evidence after the overruling of the motion. They were introduced in evidence, if introduced at all, before the motion in the course of the cross-examination of plaintiff's witnesses.

Again, it is emphasized that, in these and such like decisions, it is stated that the refusal to give such motion cannot be assigned as error, unless the defendant rests its case. It would seem that it is thought that the defendant must formally announce that he rests his case: but this is not necessary. All that is meant is, as before stated, he must not thereafter introduce any evidence. If he does, he does not rest his case. If he does not, he does rest it, and rests it on plaintiff's evidence alone.

The judgment of the lower court must therefore be reversed, and the cause remanded, with directions to award a new trial.

(152 Fed. 939.)

CUMBERLAND COAL & COKE CO. v. GRAY.

(Circuit Court of Appeals, Sixth Circuit. March 21, 1907.)

No. 1,610.

1. MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS—MINES AND MINERALS—TENNESSEE STATUTE.

Acts Tenn. 1903, p. 520, c. 237, regulating the operation of mines, requires the employment by the operator or owner of every mine, of a mine foreman who shall have a certificate of competency from an examining board, and who shall give his attention to the frequent inspection of the mine, and give all necessary directions for securing the health and safety of employés, and provides that he shall not be subject to the control of the owner or operator in the discharge of the duties required by the act. It further provides that no coal mine shall be operated for a period longer than 30 days without such certified mine foreman under penalty of a fine for each and every day after the expiration of such time. As construed by the Supreme Court of the state, such act relieves the owner or operator of a mine from liability for injuries to a miner caused by the negligence of the certified foreman in the performance of his duties. *Held*, that the provision permitting a mine to be operated for 30 days without a licensed foreman, without being subject to penalty, does not give an unlicensed foreman the standing of a lawful foreman under the act during the first 30 days of his employment, even though he is subsequently licensed, but that until so licensed the owner or operator is in control as before the act and his liability is not affected thereby.

2. SAME—ACTION FOR INJURY TO MINER—QUESTIONS FOR JURY.

In an action against a mine owner to recover for the death of a miner, alleged to have resulted from the negligence of defendant in failing to

Digitized by Google

keep its mine in safe condition, or to instruct the deceased, who was inexperienced, in respect to the peculiar dangers to which he was subjected, the evidence in support of such allegations *held* sufficient to require the submission of the case to the jury.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

S. B. Smith, for plaintiff in error.

T. A. Wright, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is an action founded upon a statute of Tennessee, giving a remedy in such cases, to recover damages sustained by the father, who is also administrator of the estate, in the death of his son, which it is alleged resulted from the negligence of the Cumberland Coal & Coke Company, which we shall herein call the "Company." There was a verdict and judgment in favor of the plaintiff for $2,500. The declaration alleged that the defendant company was a corporation, owning and operating a coal mine in Cumberland county, Tenn., in which many agents and laborers were employed, among them the deceased son of the plaintiff; and that it "was the duty of defendant to furnish plaintiff's said intestate with a safe place in which to work, to keep its mine in safe condition, instruct plaintiff's said intestate in the duties of his employment and inform him of the risks incident thereto, and have said work done under the supervision of skilled and competent agents, superintendents and foremen." Thereupon the declaration proceeds to charge that the company neglected to employ competent agents for supervision of its work and did not keep its mine in a safe condition; that on November 3, 1904, it took the plaintiff's intestate, who was young and without experience, from the work of driving a team in the mine which was free from danger and put him to work at "robbing the mine" (as the work is called) which was very hazardous, and in which he had not had experience, and did not understand the dangers; that the company failed to instruct him in regard to such dangers or how to do the work, but required him to do it in an unsafe manner which produced a dangerous and unsafe condition in the mine; that in consequence of the work being improperly done a piece of rock or slate from the roof or wall of the mine fell upon and killed him. "Robbing" a mine means taking out the pillars of ore or coal which have been left standing to support the roof while the mass is being taken out. The company filed a plea of not guilty. Upon the trial the parties produced evidence directed to the issues. At the close of the plaintiff's case, counsel for the company requested an instruction to the jury to return a verdict for that party. This the court refused, and after the taking of evidence for defendant, the request was renewed and again refused. The defendant excepted. Upon this exception the principal questions which have been presented and argued arise.

1. The first point which is urged by counsel against the judgment is this: The Legislature of Tennessee enacted a statute (Acts 1903, p.

Digitized by Google

520, c. 237), regulating the operation of mines, which required the employment by the operator of a mine, of a mine foreman who should have a certificate of competency from an examining board, and who should give his attention to the frequent inspection of the mine and of the operations going forward therein, and give all necessary directions for securing the health and safety of the employés. One of the provisions of section 20 of the chapter was:

"That said mine foreman shall not be subject to the control of the operator or owner in the discharge of the duties required of said mine foreman by this act. It shall be the duty of the mine foreman, or foremen, to see that the provisions of this section and the other duties herein defined are faithfully discharged and carried out; and in case of his or their failure to comply with such provisions, and upon conviction, he or they shall be subject to a fine of one hundred dollars each and imprisonment for a period of not less than ninety days at the discretion of the court."

It is contended that the provisions of this act deprived the company of the power of control over the operation of its mine, and therefore relieved it of responsibility for accidents occurring in such circumstances as those which existed in the present case. The principle upon which this insistence rests is no doubt sound, and is well supported by authority. This point, however, was not raised at the trial, which occurred in April, 1906. The defendant relied upon the statute of 1881 which did not contain the provision above quoted from section 20 of the act of 1903 conferring the power of control in respect to the operation of mines; and, so far as appears, the defendant did not refer to or invoke the provision of the later act. Nor was the provision referred to in the motion for a new trial subsequently entered by the defendant. Nor is the point raised by the assignment of errors filed July 11, 1906, unless it should be regarded as sufficiently assigned by the general assignment that the court erred in refusing to give a peremptory instruction to the jury to find a verdict for the defendant. In October following, the Supreme Court of Tennessee decided the case of Sale Creek Coal & Coke Co. v. Priddy, 96 S. W. 610, and therein held that, in consequence of the act of 1903, the relation "of master and servant did not exist between the mine owner and his certified foreman with reference to the duties imposed on such foreman by the statute, and that the master was therefore not liable for injuries to a miner, caused by the foreman's negligence in the performance of such duties." This ground of defense is now advanced in support of the general assignment of error in refusing the instruction asked. We cannot but think that this particular ground for the instruction was not thought of at the trial, and that it was first opened out to counsel by the decision of the Supreme Court of Tennessee in the case referred to. And we, therefore, seriously doubt whether the point was saved by the exception. In the Priddy Case, supra, the court considered the effect of the above quoted provision of the act of 1903 upon just such an exception, but whether that ground of defense was stated to the lower court, so that the ruling of the court was made in view of it, does not appear. Nor are we informed what rules the Supreme Court of Tennessee has upon the subject of exceptions and assignments of

Digitized by Google

error. As no objection of this kind is made by the defendant in error, we conclude to consider the effect of the statute upon the rights of the parties. It does not extend the control of the foreman over the discharge of all the duties which the mine owner owes to its employés. It does include the duties of inspection and the preservation of reasonably safe conditions for the work. But apparently it does not include the duty of the employer to instruct his inexperienced employés of the dangers in putting them into a kind of business or a place of work which is peculiarly hazardous; and the negligent discharge of this duty was, as we have seen, alleged in the declaration. And as there was some evidence to prove it, a verdict for the plaintiff might be rested on that ground, notwithstanding the statute. A contrary instruction would therefore have been erroneous. Moreover the foreman employed, Barnett by name, was not a licensed foreman, and therefore not such a foreman as the statute intended to intrust with such power. He had applied for a license on November 9 or 10, 1904, but it was not then granted to him, nor had it been at the time of the accident on the 23d of that month, nor did he obtain a license until the 7th day of February, following. It is true, as pointed out by counsel for the plaintiff in error, that the statute in question provides that "no coal mine shall be operated for a period longer than thirty days without such certificated mine foreman," and that "any owner, operator, or superintendent, operating a coal mine in this state for thirty days without such certificated foreman shall, upon conviction of same, be subject to a fine of $25 per day for each and every day operated without such foremen or foreman," and it is contended that a foreman without license is privileged to act as a lawful foreman during the first 30 days of his employment. But we conceive that such is not the meaning of this language. It seems to us to mean that the owner might go on with his business for 30 days with an unlicensed foreman without being subject to the obligations and the penalties prescribed by the act. Meantime he would be operating without a licensed foreman and be in control as before the act. We cannot conceive how the license granted in the February following could retroact so as to give the foreman's acts an authority which he did not theretofore possess; or how the conditions of things done in November could be affected by the license in February any more than they would be if the license had never been granted. We therefore conclude that the liability of the company was not affected by the statute.

There was evidence tending to show that the foreman negligently performed the duty of inspection. Scarcely 15 minutes had elapsed after his inspection of this room where the accident happened before the rock fell upon the deceased and killed him. Of course this would not conclusively prove negligence, but it had a tendency that way. There was other evidence of a similar tendency.

Another reason assigned in support of the assignment of error, in refusing to instruct the jury to find for the defendant, is that the father, who is plaintiff in the action and the beneficiary, was guilty of negligence in respect to the safety of his son, and was therefore

Digitized by Google

not entitled to recover. Assuming that the circumstances of this case were such that the jury might have acted upon the principle invoked, if they had found facts to justify it, yet no request was made that the court instruct the jury upon this point. We do not see any ground for a holding that as matter of law, either the deceased or the plaintiff was guilty of negligence, and the most that could be said is that the jury might have found that the plaintiff was negligent in not preventing the son from going into the room where the accident happened when he saw that a pillar supporting the roof was crushing. But how much it was crushing, or what other supports the roof might have, or what means he might at the instant have had for preventing the son, and other such questions were all for the jury to consider under proper instructions from the court in respect to the law applicable to the facts which the jury might find.

There are no other questions of any merit. And, indeed, it is only fair to say that the stress of the case was laid by counsel, in the argument, upon the question first discussed herein, namely, whether the statute of 1903, and the employment of a mine foreman, in the circumstances stated, exonerated the defendant from the charge of negligence toward the deceased.

Finding no error, we direct that the judgment be affirmed, with costs.

(152 Fed. 943.)

CODER v. ARTS. In re CODER. In re ARTS. ARTS v. CODER.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1907.)

Nos. 2,451, 65, 74, 2,452.

1. APPEAL—REVIEW—QUESTIONS OF FACT—BANKRUPTCY PROCEEDINGS.

Where one engaged principally in farming made a mortgage upon a large part of his lands for $98,503.32 to secure a pre-existing debt within four months before he filed a voluntary petition in bankruptcy and the court below sustained it, *held* (1) where the court has considered conflicting evidence and made a finding or decree, it is presumptively correct, and, unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand; (2) no such error or mistake was disclosed by the record, and the finding of the court below, that the mortgagee did not have reasonable cause to believe that it was intended to give a preference by the mortgage, and that the mortgagor did not intend thereby to hinder, delay, or defraud any of his other creditors, must be affirmed.

2. BANKRUPTCY—ADMINISTRATION OF ESTATE—PREFERENCES—EFFECT.

A transfer by an insolvent, within four months prior to the filing of a petition, for the purpose of securing or paying a pre-existing debt, without any intent or purpose to affect other creditors injuriously beyond the necessary effect of the security, is lawful, if not violative of other provisions of law, and it does not evidence any intent to hinder, delay, or defraud creditors within the meaning of Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].

3. SAME—MORTGAGES.

The transfer specified in Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], includes a mortgage or a lien voluntarily created by the debtor. If such a mortgage or lien creates a preference under section 60a, it is nevertheless not voidable under section 60b unless the creditor who receives it or is benefited thereby, had reasonable cause to believe that it was intended to give a preference by it.

Digitized by Google

4. SAME.

A transfer or mortgage made by a person adjudged a bankrupt, to secure a pre-existing debt, within four months of the filing of the petition, is not void, under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], unless it was either made with the intent on his part to hinder, delay, or defraud his creditors, or some of them, or is held void as against his creditors by the laws of the state, territory, or district in which the property is situated.

5. SAME—PROCEEDS OF MORTGAGED PROPERTY.

Where a trustee sells mortgaged property of the bankrupt free of the mortgage, and the proceeds thereof are sufficient for that purpose, the mortgagee is entitled to the payment of the interest upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Southern District of Iowa.

On Petition for Review.

For opinion below, see 145 Fed. 202.

M. L. Learned (John L. Kennedy and George W. Paine, on the brief), for Coder.

John N. Baldwin (J. P. Conner, P. E. C. Lally, and George S. Wright, on the brief), for Arts.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The court below sustained a mortgage to William Arts to secure a pre-existing debt of $98,503.32, which Alexander Armstrong, the mortgagor, owed him. This mortgage was dated May 2, 1904, recorded May 3, 1904, described 2,360 acres of land in Carroll county, Iowa, owned by Armstrong, who subsequently, and on July 27, 1904, filed his voluntary petition in bankruptcy, which was afterwards granted. The trustee assails the conclusion of the court below that this mortgage is valid by an appeal, and also by a petition to revise upon the grounds (1) that Arts had reasonable cause to believe that by this mortgage it was intended to give him a preference (section 60b, 30 Stat. c. 541, pp. 562, 560 [U. S. Comp. St. 1901, p. 3445], 32 Stat. c. 487, § 13, p. 799 [U. S. Comp. St. Supp. 1905, p. 689]); (2) that Armstrong gave the mortgage with the intent on his part to hinder, delay, and defraud his creditors (section 67e); and (3) that it was made within four months prior to the filing of the petition, and is void, although the mortgagee had no reasonable cause to believe that it was intended to give a preference by it, and the mortgagor did not make it with the intent to hinder, delay, or defraud other creditors. As the consideration of some of these contentions involves the investigation of the facts and circumstances under which the mortgage was given, the case will be considered upon the appeal and the petition to revise will be dismissed.

1. There was much conflict in the evidence, but these facts were established: Armstrong was engaged principally in farming; Arts in banking. The latter had been sole owner of a state bank in Carroll in the state of Iowa for six years, and his son, W. A. Arts, had been his cashier. As early as 1900 Arts had loaned $28,000 to Arm-

Digitized by Google

strong, and from that time until the mortgage was made he continued to loan him money in amounts varying from $20,000 to a few thousand dollars at a time, and to renew old loans until, on May 2, 1904, Armstrong owed him upon his promissory notes $98,503.32, and was overdrawn about $2,000 in his bank. The debtor had the reputation of being one of the wealthiest men in Carroll county. He held the title to 2,440 acres of land in that county, to 616½ acres in Monona county, to a residence in the town of Glidden, for which he paid about $12,000, to 200 or 300 cattle, some 30 horses, a large number of hogs, and some farm machinery. There were mortgages upon some of these lands, but they amounted to but a small proportion of the value of the real estate. In July, 1903, Armstrong had made a statement to Arts in which he estimated the value of his property at $220,000 and mentioned one mortgage for $5,900. The capital of Arts' bank was $50,000 and he had loaned to Armstrong this $98,503.32 without any security. In March and April, 1904, Arts became very seriously ill, and F. H. Arts, one of his sons, who was in business in Nebraska, was called home to attend him in his illness. While he was at Carroll, he and W. A. Arts, the cashier, examined the loans made by their father, and he suggested that as the loan to Armstrong was very large, and the facts regarding it might soon be discovered, the interests of the bank demanded that this loan should be secured. One of the sons then telephoned to Armstrong who lived several miles distant, and asked him to come to the bank. He came the next morning, and they expressed their wish to him and the reason for it. He returned to his home, sent them his tax receipts, they caused the mortgage to be drawn, and four or five days later, on May 2, 1904, he and his wife came in and executed it. On the next day Arts recorded it. At the time it was recorded Arts requested the recorder not to enter the mortgage upon a book which he kept for the convenience of newsmongers, but which was not one of the legal records of the county, and the recorder complied with his request. At the time this mortgage was made Armstrong was overdrawn in the bank about $2,000, and no security was taken for this overdraft, nor was it paid. Armstrong continued to draw checks upon the bank, and, during the month of May and a part of June, Arts paid out for him without farther security $3,000 more. Arts and his sons testified that they did not know that Armstrong was insolvent, and that they had no cause to believe that there was any intention to give Arts a preference by the execution of the mortgage. The truth was that Armstrong was insolvent. He owed about $295,000, and his property was worth about $182,000. He testified that he knew he was insolvent when he gave the mortgage. He did not inform Arts or his sons of this fact, and he made a statement in December, 1903, that he owed $36,000, and that the value of his property was $210,750, and another on June 13, 1904, more than a month after the mortgage was recorded, in which he disclosed property worth, at his estimate, $59,340 more than his debts. The mortgage to Arts covered 2,360 acres of land in Carroll county; but Armstrong held the title to 616½ acres of land in Monona county which he estimated worth $40,040, subject to a mortgage of $20,000, 80 acres near Glidden, which he estimated worth $6,400, and

Digitized by Google

personal property, which he estimated worth $28,600, which were not included in this mortgage, and which, according to these estimates made in June, 1904, were worth more than $45,000 above the incumbrances he then reported upon them. Armstrong and his wife testified, and Arts and his sons denied, that the sons agreed with Armstrong and his wife that the mortgage should be kept from the record for six months, and that when they told Arts of this contract he replied: "I guess not, too much inquiry. It will go on record." The mortgage was recorded the day after it was made. One Sterling testified, and W. A. Arts denied, that in March or April, 1904, the latter told Sterling that Henry Armstrong was no good, and the old man was no better. One Hess testified that in 1900 Armstrong owed and paid his bank $28,000, and that he then learned that he was in debt to the amount of $75,000. One Carter testified, and Arts denied, that the former, in February, 1904, tried to sell to the latter two promissory notes signed by Armstrong, and that Arts declined to buy them, and said that he was carrying the Armstrongs for all that he cared to, and that they would have to pay up before he would let them have any more money.

In this state of the evidence the court below was of the opinion that Arts did not have reasonable cause to believe that there was any intention to give him a preference by the making of this mortgage. When the court has considered conflicting evidence and made a finding or decree it is presumptively correct and unless some obvious error of law has intervened or some serious mistake of fact has been made, the finding or decree must be permitted to stand. Warren v. Burt, 7 C. C. A. 105, 110, 58 Fed. 101, 106; Paxson v. Brown, 10 C. C. A. 135, 144, 61 Fed. 874, 879; Stuart v. Hayden, 18 C. C. A. 618, 622, 72 Fed. 402, 406; Fitchett v. Blows, 20 C. C. A. 286, 290, 74 Fed. 47, 51; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649.

Armstrong was engaged principally in farming, and he was not subject to adjudication in bankruptcy upon an involuntary petition. The preference voidable under the bankruptcy law, therefore, could not arise, unless he voluntarily invited an adjudication in bankruptcy against himself. In the absence of such an adjudication a bona fide mortgage whereby a creditor obtains a larger percentage of his preexisting debt than other creditors of the same class is valid. Armstrong was reputed to be one of the wealthiest citizens of Carroll county. He made a financial statement to Arts less than a year before this mortgage was made, which disclosed property owned by him which was worth at least $100,000 above the debt to Arts, and the other debts he then mentioned. Arts had been loaning money to him without security for many years. All the testimony, which tended to show any reasonable cause for Arts to believe that there was any intention to give him a preference by the execution of this mortgage, was denied under oath. The mortgage was not taken hastily. It did not include all the debtor's property, but left personal and real estate worth many tens of thousands of dollars uncovered by it, and Arts still ex-

Digitized by Google

tended credit to Armstrong for the $2,000 overdraft, and within the next 50 days after the mortgage was made paid out for him $3,000 more without taking any security until after it had been expended. These facts support the finding below. To our minds the record discloses no mistake in the consideration of the evidence, and no error in the application of the law in the investigation of this question by the court below. Our conclusion is that Arts did not have reasonable cause to believe that there was any intention to give him a preference over other creditors by the execution of the mortgage of May 2, 1904.

2. Upon the record which has been recited the court also found that Armstrong did not make this mortgage with the intent or purpose on his part to hinder, delay, or defraud his creditors, or any of them, and no error of law or mistake of fact has been discovered in its consideration of the evidence relative to this question which would warrant a disturbance of this conclusion. The contention that the intent to hinder, delay, and defraud other creditors must be inferred from the fact that the inevitable effect of the mortgage was to deprive them of the opportunity to collect their claims in full, and from the rule of law that every one is presumed to intend the natural and probable effect of his acts, is not tenable here. It is every intent to hinder, delay, or defraud creditors unlawfully only, not every intent to hinder or delay them, that avails to avoid a transfer made for a pre-existing debt under section 67e. An insolvent debtor until the commencement of proceedings in bankruptcy still has the jus disponendi of his property. He has the right to secure and pay his debts with it, and he has the right to secure and pay one creditor in preference to others, provided always the security or the payment is not violative of any of the acts of Congress or of any of the statutes of the state. A preference of one creditor over others by such a payment or by such security, which is free from actual and intended fraud, and from any purpose to affect other creditors injuriously, beyond the necessary effect of the security or the payment, is valid and lawful, and it cannot evidence such an intent to hinder, delay and defraud as will make it void or voidable under section 67e. "Every mortgage necessarily tends to hinder or delay creditors other than the mortgagee, but a delay necessarily resulting from a fair and honest exercise of the right to dominion over one's property, and to pledge or otherwise dispose of it, is neither an unjust nor lawful interference with the rights of others and is not within the terms of the statute making void conveyances intended to hinder or delay creditors." Sabin v. Columbia River Lumber & Fuel Co., 34 Pac. 692, 695, 25 Or. 15, 42 Am. St. Rep. 756; Lampson v. Arnold, 19 Iowa, 479, 484, 485; Stewart v. Dunham, 115 U. S. 61, 66, 5 Sup. Ct. 1163, 29 L. Ed. 329. A transfer made in good faith to pay or to secure an honest antecedent debt by an insolvent within four months of the filing of a petition in bankruptcy by or against him constitutes no evidence of an intent on his part to hinder, delay, or defraud other creditors, within the meaning of section 67e of the bankruptcy law, notwithstanding the fact that its necessary effect is to hinder and delay them, and to deprive them of the opportunity they might otherwise have had to collect their claims in full.

There is no other substantial evidence in this case of any purpose

Digitized by Google

on the part of Armstrong to hinder, delay, or defraud any of his creditors. He honestly owed the entire debt he secured. He owed a banker, who for years had loaned him money whenever he desired it, without security. A part of his debt was due, and a portion had not yet matured. His creditor was ill, and his sons feared for his life. He owed him more than the entire capital of his bank, and the cashier feared that if this fact were known it might cause a run upon the institution. He was requested to protect and secure an obligation he could not immediately pay. He did so with no apparent purpose or intention except to honestly secure the payment of that which he undoubtedly would have paid as he had promised if the money to do so had been at his disposal. His act was free from fraud or unlawful intent, and the finding of the court upon this question must be affirmed.

3. Was the mortgage voidable by the trustee although the mortgagee did not have reasonable cause to believe that there was an intention to give a preference thereby under section 60b and although the mortgagor had no intent or purpose on his part to hinder, delay or defraud his creditors, or any of them, under section 67e, because the mortgage was given to secure a pre-existing debt within four months of the filing of a petition in bankruptcy? Counsel for the trustee argue that an affirmative answer should be given to this question because sections 60a and 60b have no application to liens voluntarily created, and section 67e avoids mortgages for a pre-existing debt although the mortgagor had no intent to hinder, delay, or defraud his creditors. The portions of these sections pertinent to their argument are:

"Sec. 60. Preferred Creditors.—a. A person shall be deemed to have given a preference if, being insolvent, he has procured, or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

"Sec. 67. Liens.—d. Liens given or accepted in good faith and not in contemplation of, or in fraud upon this act and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

"e. That all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act, and within four months of the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor."

The following, and many other authorities cited by counsel to sustain their contention, have been examined by the court: City National Bank v. Bruce, 109 Fed. 69, 48 C. C. A. 236; In re Sanderlin (D. C.) 109 Fed. 857; In re Jones (D. C.) 118 Fed. 673; In re Belding (D. C.) 116 Fed. 1016; In re Wolf (D. C.) 98 Fed. 84; In re

Digitized by Google

Pease (D. C.) 129 Fed. 447, 448; In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377; Keppel v. Tiffin Savings Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790; Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 557. But the word "transfer" in section 60a both by the express terms of the bankruptcy law and by authoritative decision includes "the sale and every other and different mode of disposing of, or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security." Section 1, par. 25; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 444, 21 Sup. Ct. 906, 45 L. Ed. 1171; In re Ed. W. Wright Lumber Co. (D. C.) 114 Fed. 1011, 1013. A mortgage is a security and a transfer, and subject to the provisions of section 60a and section 60b. Such a mortgage or transfer as constitutes a preference under section 60a is not voidable under section 60b by the plain words of that section, and by its adjudicated construction unless the creditor who receives it, or is benefited by it, or his agent, has reasonable cause to believe that it was intended thereby to give a preference. Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 446, 21 Sup. Ct. 906, 45 L. Ed. 1171; McNair v. McIntyre, 113 Fed. 113, 114, 51 C. C. A. 89, 90; Hussey v. Richardson-Roberts Dry Goods Co., 78 C. C. A. 370, 148 Fed. 598, 599; Pittsburgh Plate Glass Co. v. Edwards, 78 C. C. A., 191, 148 Fed. 377.

And finally, mortgages or transfers, to secure pre-existing debts made within four months of the filing of a petition in bankruptcy, are legal and valid, unless voidable by reason of some provision of the bankruptcy law, or of some state law, notwithstanding the fact that they create preferences. They are valid unless avoided; not void unless validated. The provision of section 67d, that liens for present considerations given and accepted in good faith shall not be affected by the bankruptcy law, does not strike down or render voidable those given and accepted for past considerations, and section 67e, which declares that all transfers made or given by a person adjudged a bankrupt within four months before the filing of the petition "with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void," is necessarily limited by the force of its terms to those transfers which are given with that intent only, and it leaves those given and accepted without such an intent unaffected by it and valid. A transfer or mortgage made by a person adjudged a bankrupt to secure a pre-existing debt within four months of the filing of the petition is not voidable under section 67e, unless it was either made with the intent on his part to hinder, delay or defraud his creditors, or some of them, or is held void as against his creditors by the laws of the state, territory, or district in which the property is situated. The result is that the mortgage to Arts was properly sustained by the court below.

The lands described in this mortgage were sold by the trustee free of incumbrances for $135,000, and the collection of the proceeds was completed on March 1, 1906. Out of these proceeds the court below allowed to the mortgagee the principal of his debt and interest thereon until August 26, 1904, the date on which he filed his claim. He has appealed from the decree, and has also filed a petition to re-

Digitized by Google

vise it because interest was not allowed to him until March 1, 1906, the date when the proceeds of the sale had been collected. As no issue of fact is presented, and the only question here is one of law, it will be considered upon the petition to revise, and the appeal will be dismissed. By the terms of the note and mortgage the mortgagor agreed to pay interest on his debt until it was paid, and that the mortgaged lands might be sold by the mortgagee, and that their proceeds might be applied to the payment of this debt and interest. The covenant for the sale and the application of the proceeds of these lands to the payment of the debt and interest was valid and binding, and it ran with the land, so that when the latter came to the hands of the trustee it was mortgaged for the payment of the interest as much as for the payment of the principal, and the proceeds of its sale necessarily came to his possession subject to the same charge. Another rule might prevail if the proceeds of the mortgaged property were insufficient to pay the mortgage debt and its interest in full and the mortgagee was seeking to collect an unpaid balance by sharing with other creditors in the distribution of the common property. He might not be entitled, then, to recover from the proceeds of the common property interest upon his debt to any later date than the unsecured creditors would recover interest upon their claims. But the proceeds of these mortgaged lands appear to be ample to pay the principal and interest of the debt to the mortgagee Arts, and where a trustee sells mortgaged property of the bankrupt's estate free of the mortgage, and the proceeds of the sale are sufficient for that purpose, the mortgagee is entitled to payment of the interest upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage. Thompson v. Fairbanks, 196 U. S. 516, 526, 25 Sup. Ct. 306, 49 L. Ed. 577; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782; In re Devore, Fed. Cas. No. 3847; In re J. H. Alison Lumber Co. (D. C.) 137 Fed. 643, 649.

The decree below must be revised and modified, so that the portion which directs the payment of $97,497.40 to Arts out of the proceeds of the sale of the property mortgaged to him will read:

"It is further ordered, adjudged, and decreed that said claims of William Arts on account of said four notes, including the principal and the interest thereon to March 1, 1906, aggregate $109,107.56, and that this amount be paid in full to said William Arts, the claimant, by the trustee, out of the funds and moneys in his hands which he received on account of the sale of the lands covered by the mortgage to Arts hereinbefore described, after payment of all prior liens and claims thereon as determined by the District Court."

Arts may recover his costs in this court against the trustee upon the latter's appeal, and upon the petition of Arts to revise in matter of law. The appeal of Arts, and the petition of the trustee to revise in matter of law, must be dismissed, and the case must be remanded to the court below, with instructions to modify the decree as indicated in this opinion; and it is so ordered.

Digitized by Google

(152 Fed. 951.)

CODER v. McPHERSON.

In re CODER.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1907.)

Nos. 2,453, 66.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—GROUNDS—PREFERENCE — TRANSFER OF PROPERTY.

A debtor stated to his creditor on December 24, 1903, that his property was worth $246,750, and that he owed only $36,000. On May 2, 1904, he made a mortgage on a part of his property for $98,503.32 to another creditor. On June 13, 1904, he made another statement to his creditor that his property was worth $254,740, and that he owed $195,400, of which $147,500 was secured by mortgages upon his real estate. Thereupon, the creditor to secure its claim for $22,000, took from him three mortgages which together covered substantially all the debtor's unexempt property except a few hogs and horses, including his tools, machinery, and crops, and the debtor, who was then insolvent, thereby gave a preference under section 60a of the bankruptcy law, Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. *Held*, the creditor had reasonable cause to believe when it took the mortgages that it was intended thereby to give a preference.

2. NOTICE—CONSTRUCTIVE NOTICE—FACTS PUTTING ON INQUIRY.

Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Notice, §§ 4, 6.]

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Southern District of Iowa.

On Petition for Review.

Myron L. Learned (John L. Kennedy and George W. Paine, on the brief), for Coder.

T. J. Mahoney (John N. Baldwin and George S. Wright, on the brief), for McPherson.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. On June 6, 1904, Alexander Armstrong who was engaged principally in farming, made a note for $22,000, payable to G. W. Wattles, who was the president of the Union National Bank of Omaha. On June 13, 1904, Armstrong gave to Wattles three mortgages—one on 2,440 acres of land in Carroll county, Iowa, one on 616½ acres of land in Monona county, Iowa, and a chattel mortgage on his crops, farm implements, and machinery—to secure the payment of this note. At the same time, and for the same purpose, he made an assignment of his claims against one of his sons which amounted to $27,000, but which were probably of little value. Wattles took and held this note and these securities for the bank. On July 27, 1904, Armstrong filed a voluntary petition in bankruptcy and was subsequently adjudged a bankrupt. The consideration of the note for $22,000 was an indebtedness for about that amount which Armstrong owed to the bank upon his promissory notes which were not then due. About July 15, 1904, Wattles indorsed and delivered

Digitized by Google

this note for $22,000 to Thomas B. McPherson, and in October of that year McPherson presented a claim upon this note to the referee in bankruptcy and asked that the mortgages which secured it be sustained and enforced and that his claim be paid in full out of the proceeds of the mortgaged property in preference to those of unsecured creditors. The court below rendered a decree to that effect which the trustee challenges here by an appeal and by a petition to revise. As the question at issue involves a consideration of the facts disclosed by the evidence, the case will be considered upon the appeal and the petition to revise is dismissed.

After McPherson had presented his claim, he turned the note back to the bank in the summer or fall of 1905, and counsel concede that he stood in the shoes of that corporation, so that the only question remaining to be determined in this case is, did the bank have reasonable cause to believe when the mortgages were taken for its benefit on June 13, 1904, that it was intended thereby to give it a preference under section 60b of the bankruptcy law? Act July 1, 1898, 30 Stat. c. 541, p. 562 [U. S. Comp. St. 1901, p. 3445]; Act Feb. 5, 1903, 32 Stat. c. 487, § 13, p. 799 [U. S. Comp. St. Supp. 1905, p. 689].

Armstrong was the owner of the property described in the three mortgages, of some horses and hogs and of a homestead upon which he lived in the town of Glidden in Carroll county, Iowa. He was reputed to be one of the wealthiest men in his county, and, prior to May, 1904, his credit was unquestioned. Wattles had known him for more than 20 years, but had not been so intimately acquainted with him during the 12 years just preceding 1904 as he had been for eight years before that time. The bank had purchased in the year 1903 one of Armstrong's notes for about $5,000, and when, in December of that year, this note became due, Armstrong went to the bank and sought to renew it or to borrow money to pay it. Wattles asked him for a financial statement, and he made one in which he briefly described his property, estimated its value to be $246,750 and stated that he owed in all $36,000. In reliance upon this declaration the bank loaned him about $22,000 between December 23, 1903 and June 2, 1904. On May 2, 1904, Armstrong made a mortgage on 2,360 acres of his land in Carroll county to secure a debt of $98,503.-32 which he owed to William Arts, and this mortgage was recorded on May 3, 1904. During the last days of May or the first days of June of that year Wattles, and Thomas the cashier of the bank, became aware of this mortgage, and on June 6, 1904, Thomas asked Armstrong, who appeared at the bank, for security for the debt he owed to the bank, and he promised to give it and signed the note for $22,000. He neglected to give any security for about a week and then Thomas went to Glidden and obtained the three mortgages on June 13, 1904. At the time these mortgages were made Armstrong told Thomas that he did not owe Arts more than $70,000 and he made another financial statement in which he estimated the value of his property at $254,740, and the amount of his debts at $195,400, thereby showing the value of his property to be $59,340 more than the aggregate amount of his debts. According to this declaration

Digitized by Google

the amount of Armstrong's debts secured by mortgages was $147,500. This statement was in fact incorrect, and, if Thomas had investigated the value of the property, had examined the records of the mortgages upon the lands, and had inquired of the creditors named in the statement, he would have discovered that Armstrong was insolvent. He made no investigation or inquiry of any one but Armstrong. He testified that at this time his general understanding was that Armstrong owned a great deal of property and was heavily in debt with a good substantial margin, and Wattles testified that he understood and believed that Armstrong had a very large excess of assets over his liabilities, and that he was perfectly good for all he owed. Armstrong had substantially the same property, and owed substantially the same debts on June 13, 1904, that he had and owed on July 14, 1904, when he verified his schedules in bankruptcy, and, according to these schedules he owed about $290,000, and his property was worth only about $190,000. Upon this evidence the referee found that the bank and its officers "were in possession of such facts as would have put a reasonably prudent man upon inquiry which, if made, would have shown that the bankrupt was insolvent," and the court below reversed that finding, and concluded that Armstrong did not intend to give the bank a preference, and that neither the bank nor any of its officers had reasonable cause to believe that it was intended to give a preference by means of the mortgages.

The finding of the court upon this question of fact is presumptively correct, and it should be sustained unless some obvious error of law or serious mistake of fact intervened in the consideration of the case. The fact that the referee who saw and heard the witnesses and who enjoyed the best opportunity to judge of the credibility of their testimony came to a different conclusion detracts much, however, from the strength of this presumption. As Armstrong was insolvent when he gave the mortgages, their necessary effect was to enable one of his creditors to obtain a greater percentage of its debt than others of the same class, and they therefore created a preference under section 60a.

Nearly all of the property of this debtor was real estate. According to his statement made on June 13, 1904, he owed $195,400, and had real estate with a very limited amount of personal property estimated at only $254,740 with which to pay it. It is common knowledge that lands and other real estate are converted into money and applied to the payment of debts by those who owe 75 per cent. of their estimated value with much difficulty, and the nature of this property, the large amount of the indebtedness in proportion to the estimated value of the real estate, and the known difficulty of converting such property into money to pay debts, were obvious danger signals, which would not have failed to incite a creditor of ordinary prudence to searchingly investigate the solvency of the debtor.

Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose. The bank knew that Armstrong had stated that he owed only $36,000 in December, 1903,

Digitized by Google

that he had given a mortgage to Arts for $98,503.32 in May, 1904, and that he had stated on June 13, 1904, that he owed $147,500 secured by mortgages upon his lands and $47,900 that was unsecured. According to these two statements which he had given to the bank, his indebtedness had increased $159,400 between December 24, 1903, and June 13, 1904, and his assets less than $9,000. Two such statements would inevitably incite the ordinary creditor to inquire what had become of the $150,000 which the increased indebtedness indicated that the debtor had received and had not added to his property during these six months, and such an inquest would have developed the fact at once that Armstrong's statements were not true.

He had given a mortgage of $98,503.32 to Arts, and he had informed the bank that he owed Arts only $60,000 to $70,000. The alleged fact that a debtor had given a mortgage to one of his creditors for about $30,000 more than he owed him would have stimulated a creditor of reasonable prudence to an investigation of the actual amount of this debt, and a very simple inquiry addressed to the creditor would have developed the fact that Armstrong had not told the truth here. His statement of December 24, 1903, his mortgage to Arts, and his statement of June 13, 1904, demonstrated the fact that he had not truthfully set forth his indebtedness, and constituted full notice to this bank that his indebtedness was more than he had declared it to be. In the face of this knowledge, it took these mortgages which, in the aggregate, covered substantially all the unexempt property the debtor owned except a few hogs and horses. The real estate was already mortgaged according to Armstrong's second statement for $147,500, and it took mortgages upon this land and a chattel mortgage upon his tools, machinery, and crops. The inevitable effect of these incumbrances was to deprive the unsecured creditors of every means of collecting their debts; for these mortgages withdrew from attachment and execution substantially all the debtor's unexempt property. The legal presumption is that parties intend the inevitable effect of their acts, and, in view of all these facts, the conclusion is irresistibly borne in upon our minds that the court below committed a serious mistake of fact in the examination of this case, and that the bank on July 13, 1904, when it took these mortgages, had reasonable cause to believe that it was intended thereby to give it a preference over other creditors of the same class.

The decree below must accordingly be reversed, and the case must be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion; and it is so ordered.

Digitized by Google

(152 Fed. 955.)

FIDELITY & DEPOSIT CO. v. AGNEW.

(Circuit Court of Appeals, Third Circuit. April 10, 1907.)

No. 31, March Term, 1906.

1. PRINCIPAL AND SURETY—WORKING CONTRACT—PAYMENTS ON ARCHITECT'S ESTIMATES—DISCHARGE OF SURETY.

The provision in a building or working contract that the contractor or builder shall be paid as the work progresses according to the amount of materials furnished or work performed, upon estimates to be made by the supervising architect or engineer, whether a percentage is to be retained therefrom until the whole is done or not, redounds to the benefit of a surety or guarantor of the party who is to fulfill the contract; and, upon payment being made in disregard of it, there is such a departure from the contract upon which the undertaking of the surety or guarantor is based that he is released.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 283-285.

2. SAME—ESTIMATES OF ARCHITECT—APPROVAL OF INVOICES.

Where, under an agreement to furnish material for the construction of a building, to be paid for in monthly installments, upon estimates made by the architect in charge of the work of the material on the ground delivered during the preceding month, of which 10 per cent. was to be retained until 30 days after all the material had been delivered and accepted, and satisfactory proof made that there were no liens, the only evidence as to such estimates was that the supervising architect approved the invoices on which the material was billed from the quarry, after going over them at the end of each month with the contractor of the building, or his representative, in a suit against the surety on the bond given to the contractor by the materialmen for the performance of their agreement, *held*, that the defendant was entitled to a verdict.

3. CONTRACTS—ESTIMATES BY ARCHITECT—REQUISITES OF.

Under such an agreement, the estimates to be made by the architect there provided for necessarily involved, not only an approximate judgment upon inspection by the architect or his representative of the quantity and value of the material delivered, having regard to its character as to which there may be a difference, but the relative value of it to the total quantity which had been contracted for.

4. PRINCIPAL AND SURETY—INEFFICIENCY OR MISTAKES OR ARCHITECT—FAILURE TO ACT—KNOWLEDGE OF—INFORMAL CERTIFICATES.

No doubt in such a case the builder to whom the material is to be furnished is not chargeable with the inefficiency or mistakes of the architect, provided an attempt at an estimate is really made; and, in the absence of notice to the contrary, an approval of the invoices may be sufficient for him to act upon, without a formal certificate, nothing being said about that in the agreement. But not only may the deficiencies be so gross as to put him on inquiry, but where to his certain knowledge the only basis for the architect's approval is the invoices on which the material was shipped and the representations made at the time by the builder himself or his representative, being thus fully advised as to how such approvals are obtained, they are only available to him for what they stand.

5. SAME—ADVANCE PAYMENTS—LOANS ON ACCOUNT OF MATERIAL TO BE DELIVERED.

Where, early in the performance of an agreement of the character specified, and when but little material had been delivered, the materialmen, needing money, applied to the builder for an advance, to be paid back by the shipment of material, and, the builder not being able to accommodate them himself, it was arranged that they should execute a note, which he indorsed and had discounted at the bank where he did business, the materialmen receiving the proceeds, and the understanding being that it

Digitized by Google

should be met by the shipment of material, no payment thereafter being made to the materialmen, but the value of the material shipped by them being accounted for to the bank by the builder and there credited, and the first loan which was paid being succeeded by others from time to time, all of which were finally met in this way, *held*, that the transaction could not be treated as merely an accommodation loan, to which the builder lent the security of his name, but that it constituted an advance of money upon the agreement, to be repaid by a delivery of material; the materialmen as the result having put into their hands a large sum in advance and anticipation of deliveries, in disregard of the agreement, depriving the surety of the protection and incentive of restricted payments to its prejudice, thereby releasing it from its undertaking.

6. SAME—AGREEMENT TO INDEMNIFY AND SAVE HARMLESS.

While, in a bond for the fulfillment by materialmen of an agreement to furnish certain material to one who was constructing a building, a provision to indemnify and save harmless from all damages in the premises may impose something more than the mere obligation to see to the fulfillment of the agreement so far as concerns the delivery of material, the obligation is none the less one of suretyship, imposing the reciprocal duty on the other party to not depart from it to the surety's detriment.

In Error to the Circuit Court of the United States for the District of New Jersey.

Norman Grey and John G. Johnson, for plaintiff in error.

John Harding, of Griggs & Harding, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. The provision in a building or working contract that the contractor or builder shall be paid as the work progresses according to the amount of materials furnished or work performed, upon estimates to be made by the supervising architect or engineer, whether a percentage is to be retained therefrom, until the whole is done or not, redounds to the benefit of a surety or guarantor of the party who is to fulfill the contract; and, upon payment being made in disregard of it, there is such a departure from the contract upon which the undertaking of the surety or guarantor is based that he is released. The purpose of such a stipulation is to guard against the consequences of a default, in case the principal contract proves a losing one, or the contracting party for any reason fails to comply, the percentage retained, where that is provided for, affording additional security, as well as holding out an incentive; and when it is not observed, and advance or overpayments are made, it is so obviously to the prejudice of the surety that it operates as a discharge as matter of law. Steam Navigation Co. v. Bolt, 6 Com. Bench N. S. 550; Calvert v. London Dock Co., 2 Keen, 639; Prairie State Bank v. U. S., 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; Shelton v. American Surety Co. (C. C.) 127 Fed. 736, affirmed 131 Fed. 210, 66 C. C. A. 94; Welch v. Hubschmitt, 61 N. J. Law, 57, 38 Atl. 824; Village of Chester v. Leonard, 37 Atl. 397, 68 Conn. 495; Fitzpatrick v. McAndrews, 12 Pa. Co. Ct. Rep. 353. This is too well established to be controverted, and the only question is how far it applies here.

The bond upon which suit is brought was given by the Avondale Marble Company, as principal, with the Fidelity & Deposit Company

Digitized by Google

of Maryland, as surety, to W. H. H. Van Houten, in the sum of $66,000, for the faithful performance of an agreement entered into by the marble company, to furnish and deliver marble and granite for the new courthouse, in process of construction at Paterson, N. J., of which Mr. Van Houten was the contractor or builder. By the agreement referred to it was, among other things, stipulated that "the sum to be paid by the party of the second part [Van Houten] to the party of the first part [the marble company] for the said materials shall be one hundred and ten thousand dollars" (subject to deductions as therein provided), and that the said sum should be paid in current funds on or about the 5th day of each and every month, "upon estimates made by the architect in charge of said work, of the material on the ground, delivered during the preceding month," the marble company to be paid 90 per cent. of the amount of these estimates, and 30 days after the architect should have accepted all the material the retained 10 per cent. to be paid to the marble company upon its furnishing satisfactory evidence that no liens existed thereon. The marble and granite was to be delivered f. o. b. at the quarry, at Avondale, Chester county, Pa., and shipped to Van Houten, the contractor, with the cost of the freight from the quarry to the city of Paterson "to be allowed and deducted" by him from the contract price; and upon failure to deliver it, as required by the agreement, he was to be at liberty, upon five days' written notice, to supply the material and deduct the cost from the moneys due. The complaint of the surety is that, instead of adhering to the terms of the agreement and paying upon estimates of the architect as the work went on, no estimates, or at least none worthy of the name, were made, with the result that, with the knowledge of the contractor, payments were allowed which were greatly in excess of the material delivered; and, further, that, when but a fraction of the agreement had been performed, the marble company, needing money to conduct its operations, was favored with large advances to be met by future deliveries, this arrangement continuing down to the close of the transaction, the restrictions provided by the agreement being thereby virtually abrogated. Instructions appropriate to these issues were asked at the trial, and, in view of the undisputed evidence with regard to them, the request was made by the surety that a verdict be directed in its favor. This was refused, and, the case having been submitted to the jury, a verdict of some $40,000 was rendered against it, upon which the record is now brought here for review.

The question whether estimates were in fact made was for the jury under proper instructions, provided there was evidence upon which to predicate it. But, unfortunately, all that there was upon this subject was that Mr. Reed, the supervising architect, approved the invoices, on which the material was billed from the quarry by the marble company, after going over them at the end of each month with the contractor or his son, who had charge of this part of his father's business. This was clearly not a compliance with the agreement. An estimate such as is there spoken of necessarily involved, not only an approximate judgment, upon inspection by the architect or his representative,

Digitized by Google

of the quantity and value of the material delivered, having regard to its character, whether granite, marble, or carved marble, as to which there was a considerable difference, but the relative value of it to the total quantity which had been contracted for. And when it is considered that, out of a total contract price of $110,000, representing 82,000 weighed feet to be delivered, bills for some $105,000 were approved and paid, when but 60,000 weighed feet, having a relative value of but $73,000, had been furnished—an overpayment of $32,000—it is altogether too much to ask that the mere looking over of the invoices in the way described shall be accepted as in any sense constituting an estimate such as was contemplated. The prejudice of this to the surety is manifest, the overpayment made being substantially the amount above the contract price, which is now demanded, which, had it been kept back by the contractor as provided in the agreement, he would have had in hand enough to cover the material unfurnished, without calling upon the surety.

No doubt the contractor was not chargeable with the inefficiency or mistakes of the architect, provided an attempt at an estimate was really made; and, in the absence of notice to the contrary, an approval of the invoices may have been sufficient for him to act upon without a formal certificate, nothing being said about that in the agreement. But not only were the deficiencies in the deliveries so gross as to put him upon inquiry, but the only basis for the architect's approval, to his certain knowledge, being the invoices on which the material was shipped, and the representations made at the time by himself and his son, one or both, with regard to them, he was fully advised as to how the approvals were obtained, and just what they amounted to, and they are only available to him here, in consequence, for what they stand. That Mr. Van Houten was also aware, at least in a general way, from the outstart, of the discrepancy in deliveries, is shown by his letters—one of January 5, 1898, complaining that not a hundredth part of the material had been furnished, which would only have entitled the marble company to about $1,000, after deducting the percentage, although bills to the extent of $4,450 had been already approved and paid; and another of August 4th, declaring that not quite a quarter was on the ground, at which time $30,311 had been paid, as against $24,750 due, an advancement of some $5,000. It is not necessary to consider whether, even though no estimates were made, Mr. Van Houten would have been within the terms of the agreement and the surety have no cause to complain, if the payments for material delivered did not in fact exceed 90 per cent. of its relative value. The jury were so instructed, it is true, but the evidence was so overwhelmingly the other way, that, if the case turned upon that, a verdict for the defendant was inevitable, and should have been directed. But, passing that by, it could not be successfully contended, in view of what has been referred to, either that estimates were really made or that the contractor was without knowledge, and, relying upon the apparent action of the architect in approving invoices, was therefore protected. One or the other, however, was vital to be shown, and in the absence of it the surety was released by the overpayments made in disregard of

Digitized by Google

the agreement, and the verdict to the contrary cannot be sustained.

This disposes of the case; but it is further contended that, entirely aside from whether estimates were made, the delivery of material was anticipated by advances of money, equally in contravention of and prejudicial to the rights of the surety, which also operated to release it. The facts upon which this is based are as follows: In the spring of 1898, when comparatively little material had been delivered, the marble company being short of funds, Mr. Hepburn, the manager, went to Mr. Van Houten to see whether he could not get some money for the company, asking for a lump sum, to be paid back by the shipment of material. Mr. Van Houten was willing to accommodate him, but, not having the money himself, it was suggested that they should see whether it could not be obtained elsewhere. He and Mr. Hepburn and Mr. Shaw accordingly went to the Paterson National Bank, where Mr. Van Houton did business, and, after discussing the matter there with the cashier, it was arranged that the marble company should give its note, which Mr. Van Houten would indorse and the bank discount for him, the marble company receiving the proceeds. This was carried out, a two months' note for $10,000, bearing date May 10, 1898, being made and discounted, the proceeds being credited to Mr. Van Houten, who turned the money over to the marble company. This note was subsequently paid off, as arranged, with two months' shipments; no payments being made to the marble company on these deliveries, but the value of the material being turned into the bank by Mr. Van Houten and there credited. This first note came due in July, when another note of like amount at three months' time was given and discounted; the money on this occasion being turned over to the marble company direct, against which it made payment by deliveries of material as before, through August and September, the whole being taken care of in that way. Before the second note came due, however, still another was given and discounted, September 16th, for three months, also for $10,000, overlapping the other. This one came due December 16th, and certain payments were made on it by material as before, but not enough to fully meet it, by some $6,410, which being still unpaid at its maturity was renewed by a further note for that amount at three months' time, not however by the Avondale Marble Company, whose quarry had been sold out meantime by the sheriff, but by certain individual members, who succeeded that company and organized another—the Pennsylvania Marble & Granite Company—which took over the quarry and continued the delivery of material under the existing agreement. The last-named note came due in March, 1899, and was extended by another due in May, which was itself succeeded by still another for the increased sum of $10,000, on which $3,000 was paid July 14th; a renewal for the balance, made in August, being finally paid when it came due.

The learned trial judge was of the opinion that these note transactions were merely accommodation loans having no other significance; Mr. Van Houten simply lending the security of his name by indorsing the notes of the marble company and the parties who succeeded it, which with the several renewals and extensions the bank discounted for

Digitized by Google

them. But the case is not so simple; nor is the transaction able to be separated from the existing agreement between the parties with regard to the delivery of material. As already observed, the money obtained was obtained in direct response to an application by the marble company for an advance on account of the agreement and the delivery of material to be made under it, and by the arrangement which was made for its repayment it was expressly tied up to this. No doubt, as to the bank, it was a loan; but as to the others it was essentially an advance of money upon the agreement, to be repaid by a delivery of the material there contracted for. This also was the course pursued; the value of the material subsequently delivered being turned over to the bank by Mr. Van Houten, and the marble company credited accordingly, no payments on account of material being otherwise made so long as there were these outstanding notes. It is true that the 10 per cent. was still withheld from the amounts credited, but that does not help the matter. The point is that, instead of being paid as marble and granite were delivered, as provided in the agreement, the marble company had put in its hands by the transaction a large sum of money in advance and anticipation of this. Thereafter it was not a question of payment according to deliveries, where the agreement puts it, but a repayment by deliveries outside of it. This deprived the surety of the protection and the incentive of restricted payments, and was just as prejudicial as if the advance were less disguised. The money so obtained not only helped to swell the grand total of overpayments made, but until material to correspond had been delivered, if this, indeed, was ever entirely the case, it carried these payments meanwhile by just so much more beyond bounds; the surety in either case being released by the plain departure from the terms of the agreement.

There are other questions which might require discussion, if the case were going back for a retrial, such as the deduction of freight bills before the calculation of the percentages to be withheld, instead of afterwards, and whether, upon a default by the marble company, the surety was liable to the extent contended for at the trial. But the case is to stop here, and it is not material. The point now made for the first time that the contract in the bond was something more than one of mere surety, the final clause of the condition being to indemnify and save harmless from all damages in the premises, is not only open to the objection that it was not raised in the court below and so its influence upon the disposition of the case cannot be determined; but there is no force to it, in our judgment, if it had been. It may have imposed on the surety, as argued, something more than the mere obligation to see to the fulfilment of the agreement so far as the delivery of material was concerned, but it none the less made the obligation one of suretyship, imposing the reciprocal duty on the opposite party of not departing from it to the detriment of the surety in respect of what is involved in this issue, as was clearly done.

The judgment is reversed.

Digitized by Google

(152 Fed. 978.)

GOODLANDER-ROBERTSON LUMBER CO. et al. v. ATWOOD.

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907.)

No. 694.

BANKRUPTCY—ACTS OF BANKRUPTCY—PAYMENT OF DEBTS—INTENT TO PREFER.

Defendant, at the time he made certain alleged preferential payments in order to continue in business and avoid suit, was indebted to about $20,000, and his salable property did not exceed $1,500. Much of his indebtedness was not due, and he possessed a knowledge of a rather technical business and a custom or good will which was valuable. He did not regard himself as doomed to failure but expected to continue in business and meet his obligations as they matured. The payments were of $160 and $121.15, respectively, made to bona fide creditors in the ordinary course of business. *Held*, that such payments were not made with intent to prefer, required by Bankr. Act 1898, c. 541, 30 Stat. 544, § 3, cl. 2 [U. S. Comp. St. 1901, p. 3422], and did not therefore constitute acts of bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 72, 73.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

James G. Martin and W. H. T. Loyall (Edward R. Baird, Jr., Allan G. Burrow, and Robert W. Shultice on the brief), for appellant.

G. A. Hanson and Daniel Coleman, for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. On March 27, 1906, three of the creditors of W. J. Atwood, a dealer in lumber in Norfolk, Va., filed a petition, praying that Atwood be adjudicated an involuntary bankrupt. The alleged act of bankruptcy was the payment by Atwood to the Hardwood Lumber Company, a creditor, of $160 on February 27, and of $121.15 on March 6, 1906, being then insolvent, with intent to prefer the said lumber company over his other creditors. The plea of the bankrupt to the petition consisted of a denial of the commission of the act of bankruptcy alleged in the petition. A jury trial was not demanded, and the evidence was adduced orally before the trial court, whereupon an order was entered dismissing the petition. The petitioning creditors have appealed.

It appears that the Hardwood Lumber Company sustained no relation to the alleged bankrupt other than that of one of several creditors, and that no sort of reason existed why Atwood should have desired or intended to prefer such creditor to any other creditors. The collections were made by an attorney, and the payments were made in the ordinary course of business and to avoid suit. At the time the payments were made Atwood was insolvent in the sense in which the word is used in the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544, § 1, cl. 15 [U. S. Comp. St. 1901, p. 3419]. He was indebted to about the sum of $20,000—but much of this was not then due, and his salable property did not exceed $1,500. He did have, however, a knowledge of a rather technical and not easily learned

Digitized by Google

business and a custom or "good will" which has been apparently disregarded by counsel for appellants. The question in the case is whether or not the payments were made (Bankr. Act. § 3, cl. 2) with intent to prefer. From a careful reading of the evidence we are satisfied that Atwood did not regard himself as insolvent; that he made the two payments in question, as he had been doing previously, in the ordinary course of business, and without intent to prefer the creditor. He did know that his cash receipts were not at all times sufficient to enable him to meet the bills against him promptly. But he did not regard himself as doomed to failure. In fact the evidence leads us to believe that he expected to continue in business, to meet his obligations as they fell due and that he had by no means lost hope of ultimate success. The sums which he paid were just debts, then due, rather trifling in amount when considered in connection with the business he was doing, and they were paid in order to be able to continue in business and to avoid suit. If Congress had intended that a payment made under such circumstances as we have here should be an act of bankruptcy, the language of section 3, cl. 2, of the act would have been very different. As it is written, the law makes such payments acts of bankruptcy only when made with "intent to prefer."

It is argued that every man is presumed to intend the necessary consequences of his acts. But the defendant had no reason to suppose that such consequences would be an involuntary petition in bankruptcy, the seizure of his property by a receiver and the consequent ruin of his credit and destruction of his business. The consequences of making the payments in question reasonably to be expected were a continuance in business with the prospect of an ultimate payment of all of the creditors in full. An intent to prefer is an intent that some particular creditor shall receive a greater percentage of his debt than the other creditors of the same class. In the case at bar the evidence negatives the existence of such intent.

The judgment of the trial court is affirmed.

(152 Fed. 979.)

GINTY v. NEW HAVEN IRON & STEEL CO.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 180.

MASTER AND SERVANT—INJURIES TO SERVANT—DUTY TO WARN—QUESTION FOR JURY.

In an action for injuries to a servant by the explosion of certain molten iron he was assisting to roll, evidence *held* to require submission to the jury of defendant's negligence in failing to properly warn plaintiff of the danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1044–1050.]

In Error to the Circuit Court of the United States for the District of Vermont.

See 143 Fed. 699.

This cause comes here upon appeal from a judgment of the Circuit Court, District of Connecticut, in favor of defendant in error, which was defendant

Digitized by Google

below. The action was brought to recover damages for personal injuries sustained in defendant's mill, while plaintiff was employed in the handling, with an iron hook, of some hot iron which had been taken from a furnace and run through the roughing rolls. At the close of plaintiff's testimony, defendant put in no testimony, but moved for a direction of verdict in its favor. The motion was granted.

J. T. Smith, David E. Fitzgerald, and Walter J. Walsh, for plaintiff in error.

P. W. Chase and R. J. Woodruff, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The operation which was being conducted was the heating and rolling of a box pile. A box pile apparently consists of a collection of pieces of scrap iron inclosed by four slabs so as to form a sort of boxlike structure held together by wires. This is heated in a furnace, and when nearly molten is brought out and run, one or more times, through rollers, which operate to transform it into a sheet or bar. The plaintiff testified that on the occasion in question, after the iron had been through the rolls for the first time, and while he was about to lift it to put it back again, "the iron exploded" and "he got burned all over and lost his eye." The plaintiff, a young man of 19, had been employed in similar mills for a considerable time, but in rolling box piles for five weeks only. For five months prior to that he had worked at rolling puddle balls, which consist of iron in a different condition from that of box piles.

The complaint contained two different specifications of negligence. It averred that it "was a reasonable precaution for the safety of the men employed in handling the molten mass to have a very careful and rigid inspection made of the scrap iron while it was being formed into the piles, and before it was put into the furnace, in order to detect the presence of any substance which, when coming in contact with the rollers after coming from the furnace, would be likely to cause the molten iron to explode." The answer, referring to this part of the complaint, admitted "that it might be considered a reasonable precaution, for the safety of the men employed in the same occupation as was the plaintiff, to have an inspection made of the scrap iron," etc. The complaint further averred that on the date of the accident defendant failed to make a reasonably careful inspection of the scrap iron, and failed to discover the existence in the molten mass of dirt, slag, cinder, or other foreign substances, and failed to make any inspection whatever of the pile of scrap iron. These averments were denied in the answer, which averred specifically that defendant "did take such reasonable precaution to inspect the scrap iron at all times, and did at the time the plaintiff claims to have received his injuries." The evidence did not show any failure to provide for an inspection of the scrap iron, and the court's attention at the time motion for verdict was made seems to have been entirely directed to the charge of "negligence, in that there was no inspection." If this were all of the case, we should be inclined to affirm the judgment; but there is another branch of it which seems to have been overlooked. It is conceded by the answer that, in the rolling of box piles, it will sometimes occur

Digitized by Google

that the molten mass will explode and scatter about. The answer avers that plaintiff well knew that such result might happen. The complaint avers that he was inexperienced in the business, and was "never informed, warned, or instructed concerning the same," which latter averment is denied in the answer.

Upon a careful examination of the testimony, we have reached the conclusion that there was sufficient, in the absence of further proof, to warrant the jury in finding that there was a liability to some misbehaviour of the iron when box piles were being rolled, which was more serious than the ordinary spark throwing which would be observed in a few hours experience at the work. That there was some hidden imperfection which only manifested itself occasionally, and which a man who had worked elsewhere in the mill might not discover in a brief experience at the box-pile rolls, and of which he might take precautions to avoid the consequences, if warned that it might be expected. Plaintiff testified he had not been warned or instructed. We think it best not to discuss the testimony at any greater length, because upon a new trial the case may present an entirely different aspect. The two witnesses to the accident were unintelligent, and proof was taken under such a multitude of objections, many of them quite unimportant, that it must have been difficult at the close of the case for any one to tell what had, and what had not, been proved. Had the defendant put in its own testimony, and explained by older, more experienced, and intelligent workmen the various processes, experiences, and results in the treatment of box piles, puddle balls, and other varieties of molten iron, a different situation might have been shown. It is sufficient to say that, when defendant elected not to put in any testimony, there was evidence, unsatisfactory indeed, and not especially persuasive, but sufficient to call upon defendant for an explanation of the conditions existing at the time of the accident.

The judgment is reversed.

(152 Fed. 981.)

THE ELLIS.

THE GALICIA.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1907. Rehearing Denied May 20, 1907.)

No. 1,599.

COLLISION—STEAM VESSELS MEETING—VIOLATION OF SIGNAL RULES.

Two steamships meeting in the Mississippi both *held* in fault for a collision, the descending vessel for giving the first passing signal contrary to the statutory rule, and after it had been accepted in giving a contrary signal, intended for another vessel astern of the first, but which was mistaken by the latter and acted on, directly contributing to the collision, the ascending vessel for so mistaking the second signal and acting on it, instead of sounding a danger signal and stopping until the signals were fully understood.

[Ed. Note.—Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

Digitized by Google

Appeal and Cross-Appeal from District Court of the United States for the Eastern District of Louisiana.

J. D. Rouse and Wm. Grant, for appellant.
Edgar H. Farrar, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The collision in this case resulted from a confusion and misunderstanding of signals. The first signal was given by the descending steamer Ellis, and was in violation of the letter of statutory rule 1 governing pilots on western rivers, which provides, among other things, that the pilot of the ascending steamer shall be the first to indicate the side on which he desires to pass, and that the descending steamer is entitled to the right of way. This violation, however, did not directly contribute to the collision, because it was fully understood and accepted by the ascending steamer Galicia. The second signal of two blasts given by the Ellis and intended for the ascending transfer steamer, then somewhere astern of the Galicia, was also in violation of the said rule, and led directly to the collision, for the Galicia misunderstood it, and changed her course so as to run directly across the course intended and maintained by the Ellis, rendering a collision extremely probable, if not inevitable. At the time this signal was given by the Ellis, the transfer steamer for which it was intended, if outside of its slip at all and in the river, was over 1,200 yards distant from the Ellis, and therefore such signal was premature, even if under a fair construction of rule 1 the descending steamer may signal when the ascending steamer has failed to signal, and the vessels have come near to or within the 800-yard limit. If the rule had been followed and the transfer steamer astern of the Galicia had signaled for passing by one or two blasts of its steam whistle, the Galicia, although having no special lookout astern, would have been charged with knowledge that the two blasts signals from the Ellis were in answer to and intended for another steamer, and no confusion would have resulted, except at the sole fault of the Galicia. The actual violation at the time of the collision of a statutory rule intended to prevent collisions is presumably a fault, and, if not the sole cause of the collision, at least a contributory cause. The Pennsylvania, 19 Wall. (U. S.) 136, 22 L. Ed. 148. When, after the passing signals had been given and accepted between the Ellis and the Galicia, the Ellis followed after more or less interval with a two blast signal, the Galicia should have taken it as intended for some steamer astern, but, if understanding it as intended to change the course of passing already arranged betwen the two steamers, the Galicia should have sounded the danger signal, stopped her engines, and backed if the vessels were in close proximity until the passing signals were fully understood. The Galicia did neither. She accepted the signals as intended for herself, and so changed her course as to make the collision next to certain. In this we are clear that she was in fault.

The judge of the District Court found that the faults of the Ellis

Digitized by Google

were the main causes of the collision; also, that the steamer Galicia contributed to the accident by her fault, and by the use of reasonable care and prudence she could have avoided the injury. There is much conflict in the evidence as to whether the transfer steamer was really in the river and as to the conduct of the Galicia in stopping and reversing after the danger signals were given; but, as we view the case, we are not called on to reconcile the evidence or further pass on the points involved.

We concur with the District Court in finding both vessels in fault, and the decree appealed from is affirmed. The costs of appeal and cross-appeal, including the transcript, to be divided equally between appellant and cross-appellant.

(152 Fed. 983.)

CALHOUN COUNTY BANK v. CAIN.

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907.)

No. 675.

BANKRUPTCY—PREFERENTIAL PAYMENTS—BURDEN OF PROOF.

Where a payment made by a bankrupt was in discharge of a valid obligation, the burden was on the bankrupt's trustee seeking to recover the same to show that the creditor paid had reasonable cause to believe that the bankrupt intended thereby to give a preference, as required by Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].

Appeal from the District Court of the United States for the Northern District of West Virginia, at Clarksburg.

W. N. Miller, for appellant.

T. A. Brown, for appellee.

Before GOFF, Circuit Judge, and BRAWLEY and McDOWELL, District Judges.

McDOWELL, District Judge. It seems quite unnecessary to state in detail the facts of this case. It was a suit brought by a trustee in bankruptcy to set aside certain fraudulent conveyances of property by the bankrupt to certain defendants, and to recover from the Calhoun County Bank an alleged preferential payment. We do not pause to discuss the possibility that the transaction between the bankrupt and the bank was not a payment, but a mere exchange of notes. Assuming that it was a payment, yet it was in discharge of a valid obligation from the bankrupt to the bank, and we fail to find evidence supporting the contention that the bank knew, or had reasonable cause to believe, that the bankrupt intended thereby to give a preference. Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. The burden of proof was on the trustee—complainant below and appellee here. See authorities cited in Loveland on Bankruptcy (2d Ed.) p. 609. This burden the trustee, in our opinion, failed to sustain. We are therefore constrained to hold that the decree of the learned trial court is erroneous in so far as it decrees against the appellant.

Digitized by Google

An order will be entered reversing the decree below, with costs, remanding the cause, and directing that the trial court enter a decree dismissing complainant's bill as to appellant, and adjudging to said appellant its costs in the trial court.

Reversed.

(149 Fed. 667.)

CARNEGIE STEEL CO. v. BYERS.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1907.)

No. 1,573

1. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE MACHINERY—EVIDENCE—BURDEN OF PROOF.

In an action for injuries to a servant by alleged defective machinery, the servant must not only show that the machinery was defective and that the injury was due to the defect, but also that the defect was known to the master for a sufficient time to have enabled him to repair, or should have been known, if there had been due inspection according to the ordinary course of prudent employers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 877, 888.]

2. SAME—RES IPSA LOQUITUR.

In an action for injuries to a servant by the alleged sudden raising of an elevator, caused by an alleged defect in the hydraulic cylinder, the mere fact of the accident was insufficient to establish negligence on the part of the master.[1]

3. SAME—EVIDENCE.

Evidence *held* insufficient to warrant a finding that the sudden raising of an elevator, by which the servant was injured, was caused by a defect in the appliances by which it was operated.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

C. A. Manchester, for plaintiff in error.

Charles Koonce, Jr., for defendant in error.

Before LURTON, SEVERENS and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. An action in tort for personal injury sustained by the plaintiff while in the service of the Carnegie Steel Company. There was a jury, and verdict for the plaintiff and judgment thereon.

The question upon which the case must mainly turn is whether there was any evidence from which the jury might reasonably find the plaintiff in error negligent. This question was saved by a motion, at the close of all the evidence, to instruct a verdict for the defendant below, and an exception reserved. The facts necessary to be stated are these: The defendant below is a steel manufacturing company. The plaintiff was an employé engaged about the mixer house in the operation of an electric locomotive. Cars, consisting, practically, of great metal ladles, set on wheels, were used for carrying molten iron from the furnaces to the mixer house for further steps in its conversion into steel. These ladle cars were pulled from

[1] See note at end of case.

Digitized by Google

the furnaces, over railway tracks, to the mixer house by a steam engine. There it was the business of plaintiff to take one such ladle car at a time and pull it on to the platform of an elevator, sometimes called a "jack," which platform was crossed by tracks connecting with the permanent way from the furnaces. When such a ladle car filled with molten metal was properly set upon the platform of the "jack," the elevator, upon a signal, would raise it up to an upper floor, where its contents would be emptied and the car lowered in same manner and returned to the furnaces. This elevator was operated by hydraulic pressure; the admission of water being regulated by valves controlled by a lever upon the top floor, under the management of a fellow servant, whose business it was to raise or lower the elevator as needed. These valves were of a standard kind, known as the "Aiken Valve." When in normal condition, the full pressure of water would raise the loaded platform slowly and with a steady motion. The plaintiff's petition states that on October 27th, about 8 p. m., it became necessary for him, in the performance of his duty, to move his electrical locomotive across this elevator platform, it being at rest, and that while doing so the platform, suddenly and with great force, and a jerky motion, rapidly arose from its position for some eight feet, thereby causing the front part of said locomotive to be raised with said jack, while the rear part was still upon the main track, whereby the said car was so tilted as to throw him with great force from his position in said locomotive, causing a severe injury. This result must have been a consequence of the operation of the lever controlling the power which operates the elevator, or of some defect in the valves by which water was admitted without the intentional movement of the lever opening and closing the valves. Confessedly, if the movement was due to the negligence of the employé in control of the lever, there would be no responsibility to the plaintiff, for it would be an injury due to the fault of a fellow servant. There was no evidence directly tending to show that the servant so in control of the lever had made any untimely movement. Indeed, he testified that at the time of the accident he was upon an errand in another part of the room, having left his lever at rest upon a center. Neither is there the slightest evidence of any defect in the lever, and no evidence tending to show that it might move automatically.

The specific negligence averred, and to which all of the evidence was directed, was that there was a defective valve, whereby water was permitted to pass through it, under pressure, in sufficient quantity to force the elevator up, and that the Carnegie Company had knowledge of such defective valve, or should have had knowledge if they had used due care in inspecting this elevator and its valves. Concerning the possibility that the lever above had been inadvertently or negligently handled, the circuit judge said to the jury that there was "no direct evidence" of such manipulation, though he very properly added that "the inference could be drawn from all the circumstances that it was in that way that the jack had been put in motion." In respect to the alleged defective valve, the court said:

"If from all the evidence in the case you are satisfied, by a preponderance of the evidence, that the cause of the elevation of the jack, resulting in the in-

Digitized by Google

jury, was some defective condition of the valve, whereby water was permitted to pass through it under pressure, and that it was not caused by any movement originating in the lever on the third floor, then I say to you that the fact that the water did so enter the valves and in consequence of this the jack rose * * * will permit an inference of negligence on the part of the defendant; that is to say, the circumstances of the jack rising under these conditions would itself speak, as the law puts it, and amount to primary proof of negligence on the part of the defendant."

Recurring to this, the learned judge later said:

"You are not permitted to guess or speculate as to the cause of the accident. The burden, as I said, is upon the plaintiff to show, by a preponderance of the evidence, what its cause was; but, if the plaintiff has shown such a condition of things as I have just referred to, then that shifts the burden to the defendant of showing, by a preponderance of the proof, that it was in the exercise of ordinary care."

We shall not stop to consider the objections to this charge based upon the fact that the plaintiff was an employé, and that, as between servant and master, there is no presumption of negligence from the mere proof of the happening of this accident. In such a suit it is not enough to show that there was a defective tool or machine and that the injury was due to such defect. The servant must go further, and show that the defect was known to the master for a sufficient time to have enabled him to repair, or should have been known, if there had been due inspection according to the ordinary course of prudent employers. Texas & Pacific Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Illinois Cent. Railroad Co. v. Coughlin, 132 Fed. 801, 802, 65 C. C. A. 101. In Cincinnati, etc., Ry. Co. v. South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533, we gave elaborate consideration to the circumstances under which the fact of negligence may be inferred from the nature of an accident, and noted the distinctions to be observed in applying the rule of res ipsa loquitur in suits between employers and servants and those in which liability to passengers or strangers is involved. It was not enough to show that this accident had occurred through an erratic and unexplainable rising of the elevator. That might have made a prima facie case of negligence in favor of a passenger or stranger; but the plaintiff was an employé, and the burden was upon him to show that this sudden erratic upward movement was due to some defect in the mechanism which was known, or should have been known, to the Carnegie Company, and which they had neglected to repair. The distinction referred to is pointed out in the cases cited above. The pinch of the case was, not only whether the plaintiff had shown a defective valve which might have produced such an unexpected and rapid movement as that described by the plaintiff, but also whether the defect was known or might have been known if ordinary care had been exercised.

The court denied a request to instruct a verdict for the defendant evidently upon the theory that there was evidence from which the jury might infer that the trouble was due to a defective valve, and that, if they found that to be so, the burden would shift to the defendant to show that the defect was not known or discernible by

Digitized by Google

ordinary care. We find ourselves unable to discover evidence upon which a jury might reasonably ascribe plaintiff's injury to a defective valve. For this reason, it was error to refuse the instruction to find for the plaintiff in error. The plaintiff's pleading averred that the negligence of the defendant consisted in having "negligently omitted to repair the spools of said jack and the parts thereto belonging, including the leathers thereof, and permitted same to become so worn and out of repair that they did not operate in the manner for which they were intended and as a result permitted said jack, without being controlled by said lever, to rise. * * *" Counsel for defendant in error now insist that there was evidence that the spools were working loose, and expert evidence that under such conditions water would leak in and when the cylinders filled cause the jack to move up. We have given the facts a careful scrutiny, and are persuaded that if there be any evidence from which the jury might infer this movement of the jack which injured the plaintiff was due to a defective valve, and that the defect was known or might have been known by ordinary care in inspection, that such evidence is not such as in law would justify a finding for the plaintiff.

Plaintiff's injury occurred about 8 or 8:30 o'clock p. m., upon a Sunday night. He introduced as a witness one Seaborn, who, at the time of this accident, was second helper to the millwright foreman, Davis. Seaborn testified that about 6 o'clock p. m. of the day of the accident Davis said to him that the spools in jack No. 2, the one here involved, "had been reported working loose," and that witness and Ward, who was first helper, must go and see what could be done with them. Davis' statement that the spools of No. 2 were reported as working loose cannot establish the fact that they were loose. The evidence was competent only to show notice to Davis, if by other and substantive evidence it should appear that in fact the spools were "working loosely." Seaborn then testified that, in accordance with this order, he and Ward took out the spools after cutting off the pressure, but found "nothing wrong with them." This examination, if the witness is credible, occurred only about two hours before the accident. In passing, we may observe, though any question of credibility would be for the jury, that Davis denied that any such report as to the spools of jack No. 2 had ever been made to him or that he ever so told Seaborn, or that he directed either Seaborn or Ward to examine that valve. Although every one engaged on or about this elevator was examined, no one, including Ward, ever heard of any examination of this valve at 6 o'clock or at any other time during the afternoon of the accident, and all deny that the operation of the elevator could have been stopped for such a purpose without their knowledge. But, if Seaborn is to be credited at all, he not only does not testify that he found the spools working loose, but that he found nothing wrong with them. Thus, unless there is some other testimony as to the fact that the spools were working loosely, plaintiff had no case to go to the jury. The only other scrap of evidence is that of Ward, who Seaborn says made with him the examination before referred to. After denying that Davis ever told him of any reported

Digitized by Google

looseness of the spools of this valve or that he made any examination at 6 o'clock p. m., he says that the rule of the company was that these valves should be examined every Saturday or Sunday, and that under this general custom he made the usual weekly examination of the valves of No. 2 jack on Sunday morning about 8 o'clock a. m. Touching this, Ward said, after having his attention called to the day of Byer's injury:

"Q. What time did you go to work on that Sabbath?
"A. 6:30.
"Q. In the morning?
"A. In the morning.
"Q. You may state whether you made any inspection of the valve of the No. 2 jack that morning?
"A. Yes, sir; I fitted the spool up, put new leathers on.
"Q. About what time?
"A. Well, it was between 8 and half past 8.
"Q. That was in the morning?
"A. Yes, sir.
"Q. Now, tell the jury what you did in inspecting.
"A. Well, the leathers on these, we call them 'cups' sometimes—these cups get cut more or less, or would get soft, and I put all new cups on those valves and greased them and put them back in.
"Q. Did you remove the spools in making that inspection?
"A. Yes, sir.
"Q. Took off the nuts at the end, did you, of the spool?
"A. Yes, sir.
"Q. And put in new leathers?
"A. New cups; yes, sir.
"Q. Did you put in good leathers in those places?
"A. Yes, sir; we never used anything but good leathers?
"Q. Did you observe the condition of the valve; whether it was worn?
"A. Yes, sir; it was not an old valve. We hadn't used it very long.
"Q. Did you observe the condition of the slippers of the valve?
"A. Yes, sir.
"Q. And what was their condition?
"A. Well, there was a little lost motion on the top walking beam, but none to hurt it."

Ward also testified that after this examination he turned on the pressure and found that there was no leak whatever. The "slippers" referred to are rings of brass, one above and one below the spools, and are intended to save wear of the cast parts with which the ends of the spools otherwise come in contact. Whether the slight "lost motion," referred to by Ward, was the result of wear or some other cause, is not explained. Plaintiff's expert did express an opinion that the slippers might by wear leave a space between the top and bottom of these spools and the slippers, which would cause the spools to work loosely and bring about a leaky condition of the valves which might result in causing the jack to rise. But, if plaintiff's witness, Seaborn, is to be believed about an examination made by him two hours before this accident, there was then no loose working of the spools. If Ward is to be credited, and he is not contradicted, he put in new leathers at 8 o'clock on the morning of the day of the accident, and left the valve in good working condition; the slight lost motion he found in the slippers having no effect in causing the spools to work loose. If the spools of this valve were working loosely from as early as

Digitized by Google

the morning of this accident, it is not likely that the defect would disp'ay itself in a single erratic movement of the jack, or that the jack should resume normal operation immediately after and without any repairs. A loosely working spool resulting in a leak of water into the high pressure cylinder is a condition which is remedied only by replacements or repairs. The plaintiff's expert testified that a leak due to the loose working of the spools is a condition which will inevitably display itself by the automatic movement of the jack within a short time. The force of this evidence was felt, and plaintiff's counsel endeavored to modify it by this question:

"Q. And there can be a leakage which will cause the spools to work loose, can there, without causing the jack to rise immediately?

"A. No. That is, if there is a leakage in the spools for it to get to the cylinder, yes; it would cause the jack to rise, maybe not immediately, but a few seconds before it would take effect.

"Q. I want to know in a case where the spools are working loose in an appliance of this kind, they could not be working loose for a couple of hours without causing any rise in the jack?

"A. No; they could not be working loose without causing a rise."

The expert, Popewich, did, indeed, suggest conditions which might suddenly drop a spool below the intake port; but such conditions were not here shown to be present, and such evidence could only widen the field over which conjecture might range. There was absolutely no shred of evidence of torn or worn leathers, none of a worn cylinder, or the metal sleeves of the spools. The only scintilla of evidence touching any possibly worn part was in respect to the slippers. But they were metal, and, if worn so as to cause a loose up and down motion in the spools, the cause was continuing and not sporadic. Neither would a mere leaky condition due to worn leather or slipper produce so sudden and swift a rise in the jack as that described by plaintiff. The very character of it tends strongly to show that the full force of the pressure must have been suddenly thrown into the cylinder by such an opening of an inlet port as could result only from the operation of the lever controlling the valve. This seems to be established by the evidence of certain experts of an experiment made by producing a leaky valve by scoring a number of places in the leather washers and center spool, and then putting on the full pressure without opening a port. The result was that the jack was raised only one foot in 2 minutes and 40 seconds. Thus it is plain that a mere leaky condition would not occasion so sudden a rise as that claimed.

To repeat by way of summary, we are persuaded that the sudden rising up of this jack was not due to a defective valve: (1) By the absence of any affirmative evidence of such condition; (2) by the fact that the valve worked normally for hours prior to the accident; (3) by the fact that it worked normally immediately after the accident without repair; (4) by the fact that by an examination made either ten or two hours before the accident, or at both times, revealed no defective or leaky condition; (5) by the expert evidence that a leaky condition from loosely working spools would result in a slow rise and not a rapid one as that which occurred.

Digitized by Google

The indications point very strongly to a premature movement of the lever by the servant who had charge of the movements of this jack, notwithstanding his statement that he was not near the lever. The burden, however, was upon the plaintiff to make substantive proof of some negligence—the omission of some duty which the defendant owed to him. It was incumbent upon him to show either that the jack was an improper appliance, or that the company had been negligent in keeping it in reasonably safe repair. Looney v. Metropolitan Railroad Co., 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; Illinois Cent. R. R. Co. v. Coughlin, 132 Fed. 801, 803, 65 C. C. A. 101; Texas & Pacific Railroad Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. There was no substantial evidence from which the jury might reasonably find that this accident was due to negligence. Its cause is wrapped in doubt and uncertainty. It may have happened from some cause for which the defendant was not liable or from actionable negligence. It was the duty of the plaintiff to make a case from which a jury might reasonably find negligence. This it did not do.

Reverse, and award a new trial.

NOTE.

Application of Doctrine of Res Ipsa Loquitur in Actions for Injuries to Servants.

I. In General.

[a] The fact that an employé is injured while in the service of his employer raises no presumption of negligence on the employer's part, but the employé, in order to recover for the injury, must show affirmatively the negligence of the employer.

—(U. S. 1901) Patton v. Texas & P. Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, judgment affirmed (1899) 95 Fed. 244, 37 C. C. A. 56; (1897) Peirce v. Kile, 80 Fed. 865, 26 C. C. A. 201; (1905) Northern Pac. Ry. Co. v. Dixon, 139 Fed. 737, 71 C. C. A. 555;

(Ark. 1906) St. Louis & S. F. R. Co. v. Hill, 79 Ark. 76, 94 S. W. 914;

(Colo. 1904) City of Greeley v. Foster, 32 Colo. 292, 75 Pac. 351;

(Ga. 1887) East Tennessee, V. & G. R. R. v. Maloy, 77 Ga. 237, 2 S. E. 941;

(Ill. 1901) Garden City Wire Spring Co. v. Boecher, 94 Ill. App. 96; (1905) Chicago Telephone Co. v. Schulz, 121 Ill App. 573;

(Kan. 1902) Lane v. Missouri Pac. Ry. Co., 64 Kan. 755, 68 Pac. 626;

(Mo. 1904) Glasscock v. Swofford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364, reversing judgment on rehearing (1903) 74 S. W. 1039;

(Pa. 1896) Wojciechowski v. Spreckels Sugar Refining Co., 177 Pa. 57, 35 Atl. 596; (1900) Higgins v. Fanning, 195 Pa. 599, 46 Atl. 102; (1906) Hughes v. Fayette Mfg. Co., 214 Pa. 282, 63 Atl. 692;

(Tex. 1899) Missouri, K. & T. Ry. Co. of Texas v. Crowder, 55 S. W. 380; (1905) Same v. Greenwood, 89 S. W. 810;

(Va. 1904) Moore Lime Co. v. Johnston's Adm'r, 103 Va. 84, 48 S. E. 557;

(Wash. 1903) Towle v. Stimson Mill Co., 33 Wash. 305, 74 Pac. 471;

(W. Va. 1892) Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999; (1895) Stewart v. Ohio River R. Co., 40 W. Va. 188, 20 S. E. 922.

[b] The maxim "res ipsa loquitur" is applicable under certain circumstances in suits by the servant against his master for damages from the latter's negligence.

—(Ga. 1880) Central R. & Banking Co. v. Roach, 64 Ga. 635; (1904) Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329;

(N. Y. 1902) Nolan v. Brooklyn Heights R. Co., 68 App. Div. 219, 74 N. Y. Supp. 120.

Digitized by Google

[c] (Mo. 1907) The difference between the rule res ipsa loquitur as applied to a passenger or stranger and a servant is that in the case of a passenger a presumption aids the occurrence to speak, while in the case of a servant there is no such aid, and the occurrence itself must speak its character.—Hamilton v. Kansas City Southern Ry. Co. (App.) 100 S W. 671.

[d] (N. Y. 1891) Where a foreman directs an employé to perform an act not manifestly improper in itself, and which the foreman had no reason to suspect could result in an accident, and from which the employé himself evidently did not anticipate danger, a prima facie case of negligence is not made out against the master merely by the happening of the accident.—Klupp v. United Ice Lines, 60 Hun, 586, 15 N. Y. Supp. 597, following Martin v. Cook (1891) 60 Hun, 577, 14 N. Y. Supp. 329.

[e] (Pa. 1901) In case of accident to an employé, even where the conditions are so obviously dangerous as to give rise to an inference of negligence, the master has not the burden of satisfactorily accounting for the accident, but merely of showing due care.—Spees v. Boggs, 198 Pa. 112, 47 Atl. 875, 52 L. R. A. 933, 82 Am. St. Rep. 792.

II. Collisions on Railroads.

[a] Where it appears that a servant was injured in a train collision, a prima facie case is made against the master.

—(Ill. 1904) Pittsburg, C., C. & St. L. Ry. Co. v Campbell, 116 Ill. App. 356;
(Mo. 1903) Jones v. Kansas City, Ft. S. & M. R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; (1901) Shuler v. Omaha, K. C. & E. Ry. Co., 87 Mo. App. 618; (1907) St. Clair v. St. Louis & San Francisco R. Co., 122 Mo. App. 519, 99 S. W. 775;
(N. C. 1898) Kinney v. North Carolina R. Co., 122 N. C. 961, 30 S. E. 313; (1906) Stewart v. Raleigh & A. Air Line R. Co., 141 N. C. 253, 53 S. E. 877.

[b] The mere fact of a collision does not establish a presumption of negligence on the part of a railway company in favor of its employés, such a presumption existing only in favor of passengers.

—(Ill. 1903) Illinois Cent. R. Co. v. May, 106 Ill. App. 613;
(Kan. 1873) Kansas Pac. Ry. Co. v. Salmon, 11 Kan. 83;
(Mo. 1892) Smith v. Missouri Pac. Ry. Co., 113 Mo. 70, 20 S. W. 896;
(Pa. 1893) Cole v. Northern Cent. R. R. (Com. Pl.) 12 Pa. Co. Ct. R. 573.

[c] (Ark. 1907) Kirby's Dig. § 6607, requires the employés in charge of a running train to keep a lookout for persons and property on the track, and provides that in case of an injury the burden of proof shall devolve on the railroad company to show that this duty has been performed; and section 6773 declares that railroads shall be responsible for all damages to persons and property caused by the running of trains within the state. *Held*, that where intestate, a brakeman in defendant's employ, while operating a hand car on defendant's track, was killed by a passenger train, the fact of the accident was sufficient to establish a prima facie case of negligence on the part of the railroad company.—St. Louis, I. M. & S. Ry. Co. v. Standifer, 99 S. W. 81.

[d] (Va. 1892) An engineer was injured by a collision with freight cars that had been stored on a passenger siding, but which had gotten loose and moved down on the main track. *Held*, that the court would not, in the absence of evidence to the contrary, presume that there was negligence on the part of the company in using the passenger siding for storing cars.—Norfolk & W. R. Co. v. Williams, 89 Va. 165, 15 S. E. 522.

III. Railroad Cars, Engines, Tracks, or Roadbeds.

[a] U. S. 1897) The happening of a railroad accident does not of itself prove negligence, but, where it reveals defects such that ordinary diligence and care would have discovered and prevented them, the company cannot be free from the imputation of negligence in failure to adopt some safeguards or preventive remedies in proportion to the imminency of the danger.—Patton v. Southern Ry. Co., 82 Fed. 979, 27 C. C. A. 287.

Digitized by Google

[b] (U. S. 1904) In an action against a railroad company to recover for the injury or killing of an employé, or one occupying a like relation to the company, in a wreck caused by the derailment of a train, the fact of the accident is not evidence of negligence on the part of the defendant or its employés to sustain the burden of proof resting on the plaintiff.—Chicago & N. W. Ry Co. v. O'Brien, 132 Fed. 593, 67 C. C. A. 421.

[c] (Ala. 1894) In an action against a railroad for the death of an employé, the burden on plaintiff of proving the negligence of defendant is not satisfied by proof that the deceased was killed by being thrown from one of defendant's hand cars while traversing its tracks.—Jones v. Alabama Mineral R. Co., 107 Ala. 400, 18 South. 30.

[d] (Ark. 1907) Where plaintiff, a railroad employé, was injured by the breaking of a coupling between the engine and tender, negligence of defendant could not be inferred merely from the occurrence of the accident, and the burden of proving such negligence was on plaintiff.—St. Louis & S. F. R. Co. v. Wells, 101 S. W. 738.

[e] (Ill. 1898) When a servant seeks to recover damages of his master for a personal injury resulting from defects in the machinery of a car furnished for use, the burden of proving the negligence alleged rests upon the servant. Mere proof of the accident or injury does not shift the burden of proof on the master, and require him to show that the injury did not result from his negligence.—Wabash R. Co. v. Farrell, 79 Ill. App. 508.

[f] (Iowa, 1899) Res ipsa loquitur does not apply to injuries received by a locomotive fireman riding on an engine which was derailed because of a broken axle.—Brownfield v. Chicago, R. I. & P. Ry. Co., 107 Iowa, 254, 77 N. W. 1038.

[g] (Kan. 1879) Plaintiff and other employés of defendant railroad company were pushing cars along the track near an embankment. While pushing the second car plaintiff slipped, and his hand was run over by the car wheels. He was fully aware of his surroundings, and there was no evidence of negligence on the part of any of the other servants of defendant. *Held*, that a nonsuit was properly entered.—Williams v. Atchison, T. & S. F. R. Co., 22 Kan. 117.

[h] (Ky. 1897) Where a brakeman while leaning from the end of a gondola car while the train was in motion, for the purpose of removing the pin from the drawhead after detaching a car, was thrown from the car, and killed, the mere fact that there was a "hard jerk" of the train at the time is not sufficient to show negligence on the part of those in charge of the train.—Louisville & N. R. Co. v. Fox, 42 S. W. 922, 20 Ky. Law Rep. 81.

[i] (Ky. 1903) Negligence of the master is not presumed, but must be shown; so it is not enough that, while plaintiff was propelling a hand car, the lever broke, but it must be shown there was a defect, and that it was or ought to have been known to defendant.—Brooks v. Louisville & N. R. Co., 71 S. W. 507, 24 Ky. Law Rep. 1318.

[j] (La. 1899) In an action against a railroad company to recover for the death of a brakeman in its employ, the allegation that death resulted from the derailing of the cars by reason of bad condition of track, consequent on rotten cross-ties and missing spikes, is a sufficient averment of negligence, but the failure to establish the truth thereof does not throw on defendant the burden of accounting for the accident.—Duncan v. St. Louis, I. M. & S. Ry. Co., 51 La. Ann. 1775, 26 South. 478.

[k] (Mass. 1889) Where a railroad employé, while crossing a track in the nighttime behind a train that had just passed him, was struck by a car which had become detached from the train, owing to a broken link, it was incumbent on the railroad company to explain the cause of the accident, and to show that it was not in fault.—Griffin v. Boston & A. R. Co., 148 Mass. 143, 19 N. E. 166, 12 Am. St. Rep. 526, 1 L. R. A. 698.

[l] (Mich. 1904) Where a railroad company permitted planing mill refuse to be loaded loose on an open rack car, so that, as the car was being transported, some of the material would drop from the car, and might be drawn onto the rail and lodge there by the suction of the train, and plaintiff, a railroad track hand, was injured by the derailment of a hand car, caused by the lodgment of one of the pieces of wood so transported on the rail, there being no other

Digitized by Google

possible theory of the cause of the accident, the rule that the happening of an accident was not of itself evidence of negligence did not apply.—McLean v. Pere Marquette R. Co., 137 Mich. 482, 100 N. W. 748, 11 Detroit Leg. N. 358.

[m] (Minn. 1884) In the absence of any proof as to the existence or sufficiency of regulations by a railway company for the transfer of damaged cars to a place of repair, or of any usage equivalent thereto, it cannot be presumed, in an action by an employé injured while engaged in the removal of such cars, that the railway company is in default, nor will it be presumed that such regulations or precautions were insufficient because a fellow servant in charge of the work as foreman failed to do his duty.—Fraker v. St. Paul, M. & M. Ry. Co., 32 Minn. 54, 19 N. W. 349.

[n] (Miss. 1899) Where a servant of a railroad company, standing from three to six feet from the track, was struck by something and injured as a train passed, the cause of the injury is conjectural, and there is no presumption of negligence on the part of the company.—Owen v. Illinois Cent. R. Co., 77 Miss. 142, 24 South. 899.

[o] (Mo. 1887) In an action against a railroad company to recover for the death of a fireman, caused by the track giving way under the train during a heavy rain, *held*, that the sudden giving way of the track was prima facie evidence of negligence in its construction.—Stober v. St. Louis, I. M. & S. Ry. Co., 91 Mo. 509, 4 S. W. 389.

[p] (Mo. 1903) The prima facie case of negligence occasioning a railroad wreck which would be made in favor of a passenger by the fact of the wreck, and proof of a defect in a car, does not exist in favor of a brakeman who was one of the train crew, but he will be required to prove the precise cause of the accident.—Oglesby v. Missouri Pac. Ry. Co., 177 Mo. 272, 76 S. W. 623.

[q] (N. C. 1906) Where a brakeman is injured because of the derailment of a car on which he is riding, a presumption of negligence on the part of the master arises.—Hemphill v. Buck Creek Lumber Co., 141 N. C. 487, 54 S. E. 420.

[r] (Tenn. 1891) The fact that a box placed on a hand car by order of the foreman, and on which he was standing to hold it on, struck a station platform as they were attempting to pass, thereby throwing and injuring one of the employés, of itself makes out a prima facie case of negligence.—Louisville & N. R. Co. v. Northington, 91 Tenn. (7 Pickle) 56, 17 S. W. 880, 16 L. R. A. 268.

[s] (Tex. 1897) Where the evidence shows that without some defect in the trucks of a freight car or their fastenings, or in the wheels, they should have continued in use in safe condition for 15 or 20 years, and the wheels should have lasted and been safe for 5 years; and the track was straight and in good condition, and the car heavy, but empty, and the train running at ordinary speed; and, without any apparent cause, the car dropped at one corner, left the rails, and its trucks became detached, and were found broken—the jury may infer that the car or trucks or wheels or some other parts were defective.—Jones v. Shaw (Civ. App.) 41 S. W. 690.

[t] (Tex. 1900) Where it is shown that the death of a brakeman was caused by an open switch, without his fault, it is sufficient to justify a finding that the company was negligent, unless it submits explanatory testimony, or at least shows that it had exercised proper care to keep the switch and track at that place in safe condition.—International & G. N. R. Co. v. Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772.

[u] (Tex. 1903) Where a railway bridge had been burned, and the fire had gone out, leaving the rails in position, and a train was precipitated, and the fireman injured, the injury itself would not warrant a finding of negligence of the railway company.—Texas Mexican Ry. Co. v. Mendez (Civ. App.) 78 S. W. 25.

[v] (Wis. 1898) In an action for injuries received from a fall caused by a defective rung in a semaphore pole, the court instructed that the fact that the rung came out as testified by plaintiff was presumptive of want of ordinary care on the part of defendant; that is, if there was no other evidence of how the semaphore was constructed, as to the manner and degree of care exercised in putting in the rungs, it would be presumed to have been imperfectly constructed from the fact that the rung was loose when plaintiff took hold

Digitized by Google

of it, if such was the fact. *Held* no error.—Welty v. Lake Superior Terminal & Transfer Co., 100 Wis. 128, 75 N. W. 1022.

IV. Objects Falling from Trains, Buildings, or Other Structures.

[a] (Colo. 1896) Mere evidence that deceased, a track repairer, while walking outside the track, in the performance of his duties, was fatally injured by a large lump of coal which fell from a passing train, is insufficient to show negligence on the part of the company.—Anderson v. Union Pac., D. & G. Ry. Co., 8 Colo. App. 521, 46 Pac. 840.

[b] (Colo. 1903) Where plaintiff, a lineman in defendant's employ, was injured by the falling of a defective pole which he had ascended to change certain wires thereon, mere proof of the accident was insufficient to establish defendant's negligence.—Kellogg v. Denver City Tramway Co., 18 Colo. App., 475, 72 Pac. 609.

[c] (Ga. 1887) In an action by a wife against a railroad company for the killing of her husband, a bridge keeper in defendant's employ, the evidence showed that a piece of wood, such as was used in firing the defendant's engines, was found shortly after the passing of trains, lying in the bridge, and plaintiff's husband lying there with it, dead, his head crushed with it. *Held* ample to justify the denial of a nonsuit.—Central R. R. v. Rouse, 77 Ga. 393, 3 S. E. 307.

[d] (Ill. 1901) Where an employé in a packing house, while at work at a table trimming meat, is injured by the fall of an empty barrel from a platform above her, and there is no evidence by way of explanation as to how the barrel came to fall, a prima facie case of negligence is made, casting on the employer the burden of rebutting it.—Armour v. Golkowska, 95 Ill. App. 492.

[e] (Iowa, 1902) While a section hand on a railroad was standing beside the track as a freight train passed, something struck his eye, causing a stinging sensation. The engine had passed, and was about 100 feet from him, and the wind blew from the train towards him. Shortly thereafter three particles of coal, each about the size of a pin head, were removed, and the sight of that eye was lost. *Held* not to warrant an inference of negligence, either in the improper management of the engine, or the lack of proper equipment.—Duree v. Chicago, M. & St. P. Ry. Co., 118 Iowa, 640, 92 N. W. 890.

[f] (Iowa, 1906) In a personal injury action by a servant, evidence *held* sufficient either under or aside from the maxim "res ipsa loquitur" to take to the jury plaintiff's contention that the unseen blow causing the injury came from an iron pipe accidentally dislodged from refuse on an upper floor, and falling thence through an opening upon him below, rather than from an unseen assailant or an accidental fall.—Huggard v. Glucose Sugar Refining Co., 109 N. W. 475.

[g] (Mich. 1891) Plaintiff, employed in defendant's boiler shop, was directed to rivet together pieces of a boiler front, eight feet square, placed in position for him, and when about two-thirds through the work it fell upon him, causing serious injuries. In an action therefor, he did not show how the pieces were secured or fastened in position, or whether they were secured in the customary manner, or what caused the fall. *Held*, that affirmative proof of negligence was necessary.—Toomey v. Eureka Iron & Steel Works, 89 Mich. 249, 50 N. W. 850.

[h] (Mo. 1899) Plaintiff was hurt, while working in the place assigned her, through the falling of a drum or post used by a contractor repairing the room where she worked. *Held*, on the principle of the maxim, "Res ipsa loquitur," that the injury created a presumption of negligence, and the burden was cast upon defendant to show that the cause of the injury was consistent with careful handling of the repair work.—Sackewitz v. American Biscuit Mfg. Co., 78 Mo. App. 144.

[i] (Mo. 1902) In an action for injuries sustained by an employé from a stone falling from a building in process of construction, it is error to refuse to instruct that the fact that plaintiff was injured is, in itself, no evidence of any negligence on the part of the defendants, but, on the contrary, the plaintiff must, by his evidence, show that the defendants were guilty of negligence; and the burden of proof is on plaintiff to establish such negligence by the greater weight of evidence.—Kelly v. Stewart, 93 Mo. App. 47.

Digitized by Google

[j] (Mo. 1904) In an action against a master by a servant for personal injuries, evidence that a crowbar used by other servants fell through the floor to the next story, and struck plaintiff on the head, was sufficient to cast on defendant the necessity of showing that the accident was not the result of negligence.—Johnson v. Metropolitan St. Ry. Co., 104 Mo. App. 588, 78 S. W. 275.

[k] (N. Y. 1902) Where a servant, while under an elevated railroad structure maintained by his master, was injured by a block falling on him from such structure, but there was no evidence to show whether it was a part of the structure, merely lying on it, and the evidence showed that a train was passing over the road when the block fell, so that it might have fallen from the train, there was no evidence raising a presumption of negligence on the part of the master under the doctrine of res ipsa loquitur.—Nolan v. Brooklyn Heights R. Co., 68 App. Div. 219, 74 N. Y. Supp. 120.

[l] (N. C. 1906) Where a hostler of a railroad company was occupied with his duties between a coal car and a tender, and his helpers were shoveling coal from the car to the tender and knew he was working around the tender, and he was injured by a 100-pound lump of coal falling on him, the doctrine of res ipsa loquitur applies.—Fitzgerald v. Southern Ry. Co., 141 N. C. 530, 54 S. E. 391, 6 L. R. A. (N. S.) 337.

[m] (Pa. 1900) Negligence is not to be inferred from the mere happening of an accident; and hence, where an employé is injured by a falling body while lawfully engaged upon the property of the employer, it is not sufficient to show that the accident happened, but the plaintiff, in order to recover, must also show negligence on the part of defendant.—Hanna v. Gresh (Com. Pl.) 16 Montg. Co. Law Rep'r, 182.

[n] (Tex. 1896) In an action for the death of a brakeman, where there is evidence that he was killed by a steel rail falling from the flat car on which it was loaded, and being thrown against him by the motion of the train while he was sitting on a rear car, it is error to direct a verdict for defendant.—McCray v. Galveston, H. & S. A. Ry. Co., 89 Tex. 168, 34 S. W. 95, reversing (Civ. App. 1895) 32 S. W. 548.

[o] (Tex. 1901) Proof that a piece of coal flew from the tender of a passing train and injured a section hand, who was standing at a reasonable distance from the track, in the absence of explanation, under the doctrine of res ipsa loquitur, constituted sufficient evidence of negligence on the part of the company to establish a prima facie case, notwithstanding the coal was properly loaded on the tender.—Gulf, C. & S. F. Ry. Co. v Wood (Civ. App.) 63 S. W. 164.

V. Machinery in General.

[a] (Ill. 1896) The mere fact that an employé was caught in the mesh of gearing six feet five inches above the floor does not show negligence.—Eckels v. Chicago Ship Bldg. Co., 63 Ill. App. 436.

[b] (Ill. 1896) Where one employed at a wood planer pushes his hand under the edge of a cap made to cover the revolving knife, and is injured, no such negligence of the master is shown as would render him liable.—Huffer v. Herman, 66 Ill. App. 481.

[c] (Ill. 1899) When a servant seeks to recover for a personal injury, resulting from defects in the machinery furnished for his use, the burden of proving the negligence alleged rests upon the servant, and mere proof of the injury does not shift the burden of proof on the master.—Viles v. Stantesky, 83 Ill. App. 398.

[d] (Md. 1902) A detachable knife flew from the machine and injured an employé. On examination the bolts fastening the knife to the machine were found broken. The machine was at the time subjected to no unusual strain, and the accident was unprecedented. The employé who had adjusted the knife testified that the machinery was in perfect condition; that he fastened the bolt on all right; that he could not explain the accident. *Held*, that the doctrine of res ipsa loquitur was inapplicable, the knife not being a permanent feature of the machinery, and the defendant company offering what evidence it could to explain the accident.—South Baltimore Car Works v. Schaefer, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560.

Digitized by Google

[e] (Mass. 1888) Where a servant was injured by the unexplained breaking of a machine which he was using properly, and of whose ill repair he did not know, binding instructions for defendant are properly refused.—Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348.

[f] (Mass. 1897) Plaintiff, defendant's employé, was injured by the flying apart of the cylinder of defendant's machine, which had been recently purchased of a reputable manufacturer. The evidence tended to show that the cause of the accident was the existence of blow holes, which could not have been detected by inspection. *Held* not error to charge that the happening of the accident did not itself show negligence, since, though the machinery may have been defective, defendant may have exercised due care by the purchase thereof of a reputable manufacturer.—Reynolds v. Merchants' Woolen Co., 168 Mass. 501, 47 N. E. 406.

[g] (Mich. 1893) In an action by an employé for personal injuries caused by the failure of certain machinery to work properly at the particular time of the accident, plaintiff must prove that defendant was negligent, and it cannot be conjectured from the mere fact of the accident.—Redmond v. Delta Lumber Co., 96 Mich. 545, 55 N. W. 1004.

[h] (Mo. 1889) The mere fact that machinery has a latent defect does not, prima facie, establish negligence on the part of the master.—O'Donnell v. Baum, 38 Mo. App. 245.

[i] (N. Y. 1905) That a bolt in a machine for making moldings broke, and allowed a knife to fly off, is not sufficient evidence that an employer was negligent or that he failed to perform his duty to furnish a reasonably safe machine.—Moran v. Mulligan, 110 App. Div. 208, 97 N Y. Supp. 7.

[j] (Pa. 1893) Where an employé operating a machine, which was a safe and proper one in its construction, and such as was used in other factories of the kind, and was in no way out of repair, was injured by the sudden starting of the machine while he was cleaning it, and there was no proof as to the cause of starting, there is nothing to justify a conclusion that there was negligence on the part of the employer; the mere fact of the injury not warranting such inference.—Ash v. Verlenden, 154 Pa. 246, 26 Atl. 374, 32 Wkly. Notes Cas. 198.

[k] (S. C. 1905) Where an accident happens to a servant by the breaking of a machine in ordinary use, and there is neither proof of defects in the machine nor of error in its use by the servant, the law will not draw the inference that the machine was defective, and then from that the inference of lack of care of the master.—Green v. Southern Ry. Co., 72 S. C. 398, 52 S. E. 45.

[l] (S. C. 1906) The fact that a servant is injured by the failure of the machinery furnished by the master does not raise a presumption of negligence on the latter's part.—Green v. Catawba Power Co., 55 S. E. 125.

[m] (Wis. 1897) The presumption of negligence arising from the fact that the die of a stamping machine, so constructed that the die descended only on pressure of the treadle, descended without apparent cause, is conclusively rebutted by proof that there was no discoverable defect.—Vorbrich v. Geuder & Paeschke Mfg. Co., 96 Wis. 277, 71 N. W. 434.

[n] (Wis. 1901) In an action for injuries caused by a slat saw, at which plaintiff worked, where the theory was that plaintiff's hand passed beneath the overhanging steel guard and came in contact with the saw, there being evidence that considerable blood was found on parts of the machine below the table, and only scattering spots above, and hence that the injury might have come from the lower parts of the saw, and possibly without defendant's negligence, the rule that the mere happening of the accident established defendant's negligence is inapplicable.—Beyersdorf v. Cream City Sash & Door Co., 109 Wis. 456, 84 N. W. 860.

VI. Elevators, Derricks, and Other Hoisting Apparatus.

[a] (Ill. 1904) Plaintiff was directed by his foreman to go to a pile driver and detach certain tackle from the top thereof. The guy ropes holding the pile driver in an upright position at the time plaintiff approached it were sufficient, but he removed one-half of such ropes, after which he climbed up the pile driver, which was then in a leaning position; and while he was on the same it fell, and plaintiff was injured. *Held*, that since the accident did not

Digitized by Google

result from the condition of the pile driver, in which defendant placed and left it, plaintiff could not recover under the doctrine of res ipsa loquitur.—Illinois Cent. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737.

[b] (Ind. 1907) Where a safety clutch in a freight elevator wholly failed to act when an emergency arose, and the servant in no way contributed to such failure, its failure to act affords evidence of negligence on the part of the master under the doctrine of res ipsa loquitur. Judgment (1906) 78 N. E. 251, affirmed on rehearing.—National Biscuit Co. v. Wilson (App.) 80 N. E. 33.

[c] (Mass. 1894) Plaintiff's intestate, an employé of defendant, was helping to raise the door of a furnace, when the lever he was using broke, and the door fell, causing the injuries complained of. *Held* that, there being no evidence that the stick was defective except that it broke, and none that any defect could have been discovered by inspection, the case should have been taken from the jury.—Allen v. G. W. & F. Smith Iron Co., 160 Mass. 557, 36 N. E. 581.

[d] (Mass. 1904) Where a freight elevator had been provided with safety clutches to prevent it from falling if, for any reason, the motive power failed to work properly, and certain of defendant's servants were injured by the fall of the elevator while using it, proof of the occurrence of the accident alone was not sufficient to establish a prima facie case of defendant's negligence.—Droney v. Doherty, 186 Mass. 205, 71 N. E. 547; Briggs v. Same, Id.

[e] (Mass. 1907) Where a buffer iron, used to stop at a desired point buckets running along an iron rail of a trench machine owned and operated by defendant, slipped off the bolt on which it was hung by reason of the coming out of the split key used to hold it in place, and fell on plaintiff, an employé of defendant, while working in the trench below the machine, the falling of the buffer was, under the circumstances, in itself evidence of negligence.—Sullivan v. Rowe, 80 N. E. 459.

[f] (Minn. 1891) An elevator was operated by weights attached to iron rods by which they were suspended and kept in place. One of the weights became detached, fell through the top of the elevator car, and injured a servant employed to operate it. *Held*, that negligence could not be presumed from the accident.—Davidson v. Davidson, 46 Minn. 117, 48 N. W. 560.

[g] (Mo. 1903) A servant was injured by the falling of an iron hanger from a bundle of hangers which he was hoisting to an upper floor of his master's building by means of a rope passing over a pulley, one end of the rope being tied around the bundle. The rope was old, stiff, and frazzled at one end, but had been in use for several days, having been substituted for another rope in good condition by order of the master's foreman. It was not shown what caused the rope to become untied. *Held* that as, even though the most perfect rope had been used, the irons might have slipped if insecurely tied, or might have become loosened by coming into forcible contact with some object during their ascent, the character of the rope did not alone account for the slipping of the irons therefrom, and the doctrine of res ipsa loquitur did not apply.—Cothron v. Cudahy Packing Co., 98 Mo. App. 343, 73 S. W. 279.

[h] (N. Y. 1904) Where a derrick furnished by the master falls, injuring an employé, the failure of the master to explain the fall is prima facie evidence of his negligence; and a verdict for him, rendered in an action for damages, should be set aside as against the evidence.—Gorman v. Milliken, 42 Misc. Rep. 336, 86 N. Y. Supp. 699.

[i] (N. Y. 1905) Plaintiff, a servant, was injured by the fall of a freight elevator in defendant's storehouse, which had been in common use and had worked satisfactorily for five years, and had shown no indication of being out of repair. At the time of the fall it was not overloaded, and the cause of the fall was not shown. Defendant's superintendent also testified that machinists had made repairs on the elevator when necessary from time to time. *Held*, that the happening of the accident under such circumstances was not prima facie evidence of negligence, under the doctrine of res ipsa loquitur. Judgment (1904) 99 App. Div. 262, 90 N. Y. Supp. 1045, affirmed.—Stackpole v. Wray, 182 N. Y. 567, 75 N. E. 1134.

[j] (N. Y. 1905) The fact that a servant was killed by the fall, without any apparent cause, of a freight elevator in which he was riding, does not render

Digitized by Google

the master liable under the doctrine of res ipsa loquitur.—Starer v. Stern, 100 App. Div. 393, 91 N. Y. Supp. 821.

[k] (N. Y. 1905) An employé, injured by a nut on the end of a shaft in some way coming loose, allowing a pulley to fall on her, does not make out a prima facie case, under the rule of res ipsa loquitur; the attendant circumstances not suggesting the employer had failed in any duty owing the employé.—Griffin v. Flank, 48 Misc. Rep. 617, 95 N. Y. Supp. 546.

[l] (N. Y. 1906) The falling of a derrick set up by servants, which results in injury to another servant raises no presumption of negligence against the master.—Fallon v. Mertz, 110 App. Div. 755, 97 N. Y. Supp. 417.

[m] (N. Y. 1906) Deceased and another of defendant's servants got on an elevator in defendant's building, and after the elevator had risen a few feet the bottom of it was torn out, and deceased fell to the basement and was killed. The elevator was being run by the person employed to operate it, and there was evidence that it was in the habit of shaking, tilting, and jerking, as though the sides of the bottom caught. *Held*, that such facts were sufficient to justify an inference of defendant's negligence under the doctrine of "res ipsa loquitur."—Samuels v. McKesson, 113 App. Div. 497, 99 N. Y Supp. 294.

[n] (N. C. 1904) In an action for injuries sustained by a servant owing to the fall of a freight elevator while he was operating it, it was proper to instruct that negligence was not to be inferred from the mere fact that an accident occurred.—Womble v. Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493.

[o] (N. C. 1906) In an action by servant for personal injuries received while riding upon a freight elevator in the discharge of his duties, evidence *held* sufficient, under the doctrine of res ipsa loquitur, to require submission to the jury of the question of defendant's negligence.—Fearington v. Blackwell Durham Tobacco Co., 141 N. C. 80, 53 S. E. 662.

[p] (Or. 1902) Mere proof of death of an employé from the breaking of a pulley at the machine operated by him is not, in the absence of explanation by the master, itself evidence of negligence of the master.—Duntley v. Inman, Poulsen & Co., 42 Or. 334, 70 Pac. 529, 59 L. R. A. 785.

[q] (Pa. 1898) The knot formed by the tying together of two ropes for a guy in a hoisting apparatus having come undone during the lifting, resulting in injury to an employé, there is a presumption of negligence, which the master, who tied the knot, has the burden of overcoming.—Folk v. Schaeffer, 186 Pa. 253, 40 Atl. 401.

[r] (Tex. 1906) Where plaintiff's intestate, while being hoisted out of defendant's shaft in a bucket, was precipitated into the shaft by the cable running off the end of the drum, evidence that the engine and drum were negligently placed, so that the cable was not in proper alignment with the pulley at the top of the shaft, made out a clear case of res ipsa loquitur, and was sufficient to sustain a verdict for plaintiff, although defendant's witnesses claimed to have adjusted the machinery in a very careful manner, but were unable to account for the accident unless the drum of the engine was considerably out of alignment with the shive wheel.—Texas & P. Coal Co. v. Daves (Civ. App.) 92 S. W. 275.

[s] (Tex. 1907) In an action for injuries to an employé while raising a smokestack by its fall, proof that a hook in the block and tackle used to lift the smokestack straightened out, because of the mere weight of the smokestack, was prima facie proof that the employer was negligent in failing to furnish a proper hook, casting on him the burden of showing that he used ordinary care in selecting and testing it.—El Paso Foundry & Machine Co. v. De Guereque (Civ. App.) 101 S. W. 814.

[t] (Wis. 1900) Where a bolt in a hoisting machine broke, killing the operator, and it had been used several weeks, and subjected to greater loads than the one at the time of the accident, it is error to charge that the mere breaking thereof raised a presumption of negligence on the part of the employer in the construction thereof.—Spille v. Wisconsin Bridge & Iron Co., 105 Wis. 340, 81 N. W. 397.

VII. Tools, Appliances, and Other Apparatus.

[a] (U. S. 1894) In an action for injuries caused by the breaking of the handle of a ladle which had been used for 15 years, the court properly direct-

Digitized by Google

ed a verdict for defendant, in the absence of any showing that there was in the ladle an obvious defect, or one which defendant would have discovered by the exercise of due care.—Reilly v. Campbell, 59 Fed. 990, 8 C. C. A. 438, 20 U. S. App. 334.

[b] (U. S. 1883) The mere happening of an accident is not prima facie evidence of the negligence of the employer; but, where the cause of the accident is known to be some particular defect in the tools, machinery, or other appliances, the existence of the defect is of itself evidence of negligence, for which liability attaches, unless the employer can satisfactorily explain by proof that he has not been negligent in the matter of providing against the defect.—Smith v. Memphis & L. R. R. Co. (C. C.) 18 Fed. 304.

[c] (Ill. 1905) The doctrine of res ipsa loquitur sometimes applies as between master and servant, where the injury resulted to the servant through the employment by the master of a defective electric appliance.—Goddard v. Enzler, 123 Ill. App. 108, judgment affirmed (1906) 222 Ill. 462, 78 N. E. 805.

[d] (Me. 1902) Where there is no affirmative proof of culpable negligence on the part of defendant master, the fact that an accident happened to an employé raises the presumption, if any, that defendant has complied with the obligation resting upon him to furnish reasonable appliances equally with other men.—Pellerin v. International Paper Co., 96 Me. 388, 52 Atl. 842.

[e] (Mass. 1897) The breaking of a shank while being properly used in carrying a vessel of melted iron is evidence that it was unsafe for that use. —Coleman v. Mechanics' Iron Foundry Co., 168 Mass. 254, 46 N. E. 1065.

[f] (Mass. 1901) A servant injured by the breaking of a stepladder cannot invoke the rule of res ipsa loquitur, because it cannot be said that the fact of its breaking points to a defect, rather than to the carelessness on the part of the servant.—Drum v. New England Cotton Yarn Co., 180 Mass. 113, 61 N. E. 812.

[g] (Mo. 1903) In an action by a servant for injuries alleged to have been caused by the master's failure to furnish safe appliances, the burden is on the plaintiff to show that the appliances were defective to the knowledge of the master had he exercised ordinary care, no presumption of negligence arising from the mere happening of the accident.—Glasscock v. Swofford Bros. Dry Goods Co. (App.) 74 S W. 1039.

[h] (Mo. 1907) Where plaintiff, a brakeman in defendant railroad's employ, was setting a hand brake on top of a car, and was thrown from the car by the giving way of something connected with the brake appliances, thus permitting the wheel to revolve rapidly, the doctrine of res ipsa loquitur was not applicable in aid of plaintiff's recovery, there being no affirmative proof of defendant's negligence.—Hamilton v. Kansas City Southern Ry. Co. (App.) 100 S. W. 671.

[i] (Neb. 1898) Where the injuries resulted from the use of a defective tool or appliance, the fact that the accident happened cannot be taken as evidence of the master's negligence, but, to entitle plaintiff to a verdict, he must affirmatively show that the master either knew or was inexcusably ignorant of such defect.—Chicago, B. & Q. R. Co. v. Kellogg, 55 Neb. 748, 76 N. W. 462.

[j] (N. Y. 1897) Negligence in furnishing improper appliances is not shown by the fact that an employé was injured because the brake on a car did not act effectually, where the car had been properly inspected before it left the yard, and the brake was then in proper condition.—Hanrahan v. Brooklyn El. R. Co., 17 App. Div. 588, 45 N. Y. Supp. 474.

[k] (N. Y. 1899) No such presumption arises as to a defect in an appliance which gives way under an extraordinary strain as in a case where it fails in the ordinary conduct of the work for which it is being used.—Olsen v. Starin, 43 App. Div. 422, 60 N. Y. Supp. 134.

[l] (N. C. 1906) The doctrine of res ipsa loquitur is not confined to cases of the failure of some mechanical appliance or contrivance or machine, which fails in some unusual and unexpected manner to do its work properly.—Fitzgerald v. Southern Ry. Co., 141 N. C. 530, 54 S. E. 391, 6 L. R. A. (N. S.) 337.

[m] (Tenn. 1903) No presumption of the master's negligence arises from the mere fact of the servant's injury by an appliance latently defective.—

Digitized by Google

East Tennessee & W. N. C. R. Co. v. Lindamood, 111 Tenn. (3 Cates) 457, 78 S. W. 99.

[n] (W. Va. 1889) It appeared that plaintiff, a fireman on defendant's road, after having let the spout down conveying the water from a water-tank to his engine, walked out upon the spout several feet and pulled the chain by means of which the water was turned on, and immediately thereafter the spout broke loose from the tank, causing injuries for which plaintiff brought suit. There was some evidence that the chain was too short, but otherwise there was no evidence of any defect about the tank. *Held*, that a demurrer to plaintiff's evidence should have been sustained.—Humphreys v. Newport News & M. V. Co., 33 W. Va. 135, 10 S. E. 39.

VIII. Mines and Other Excavations.

[a] (U. S. 1903) In an action to recover for the death of an employé killed by the caving in of a mine, in which there is no question of contributory negligence or the negligence of a fellow servant, but the right to recover depends solely on the negligence of defendant, the burden of proof on such issue rests on the plaintiff, and the fact of the cave-in itself carries no presumption of negligence.—Mountain Copper Co. v. Van Buren, 123 Fed. 61, 59 C. C. A. 279.

[b] (U. S. 1906) Plaintiff's intestate was employed as a miner in defendant's mine, which had a 600-foot shaft having two compartments; one used as a bucket way, and the other for a ladder. He had just come to the top in the bucket, when, while being lowered again for other miners, the bucket broke from the rope and stuck at one of the intermediate levels. In order to free it so that another bucket could be sent down, deceased went alone down the ladder. He reached the level where the bucket was and removed it from the shaft, and his body was afterward found at the foot of the shaft at a lower level. There was no evidence to show how or why he fell, and the ladder was in good condition. *Held*, that no inference of negligence on the part of defendant could be drawn from the fact of the accident, nor could liability be based on any defect in bucket shaft, which may have caused the falling of the bucket, but had no connection with the subsequent accident to deceased, and that the court properly directed a verdict for defendant.—Leonard v. Miami Min. Co., 148 Fed. 827, 78 C. C. A. 517.

[c] (Ala. 1906) Where plaintiff, a servant, was injured by the derailment of a slate car, which he prematurely dumped in violation of orders, the fact that plaintiff was injured by being thrown from the car was insufficient in itself to establish defendant's negligence.—Redus v. Milner Coal & R. Co., 41 South. 634.

[d] (N. Y. 1892) Plaintiffs' intestate, an employé of defendant, who was a plumber, entered a street excavation 13 feet deep and 4 feet wide to solder a pipe, and the excavation, being not boarded up, caved in, and caused intestate's death. There was no proof that defendant ever saw the excavation, or that it was prepared by him or his employés as a place for decedent to work in, and there was nothing to show an express or implied direction from the master to enter the excavation in its then condition, or any representation, express or implied, as to its safety. *Held*, that the court properly refused to submit the question of defendant's negligence to the jury.—Stuber v. McEntee (Super. N. Y.) 61 N. Y. Super. Ct. 338, 19 N. Y. Supp. 900, judgment reversed (1894) 142 N. Y. 200, 36 N. E. 878.

[e] (N. Y. 1902) A prima facie case for plaintiff is made out by proof that injury to an employé in a mine resulted from the sudden and unexplained giving way of the place he was required to pass over to reach his work.—Lentino v. Port Henry Iron Ore Co., 71 App. Div. 466, 75 N. Y. Supp. 755.

[f] (Wash. 1898) A fire of unknown origin in a mine, suddenly started in a place inspected the evening before, not the result of spontaneous combustion, or any act imputable to the mine owner, is not of itself proof of his negligence.—Hughes v. Oregon Imp. Co., 20 Wash. 294, 55 Pac. 119.

[g] (Wis. 1886) Where plaintiff's intestate, a common laborer, was placed at work at the bottom of a cistern, the falling of a wall thereof on him by its own weight, or by the pressure of gravel and earth behind it, is prima facie

Digitized by Google

evidence of negligence on the part of the employer.—Mulcairns v. City of Janesville, 67 Wis. 24, 29 N. W. 565.

[h] (Wis. 1901) In a suit for injuries received by an employé in falling into a charcoal pit, a finding that the ground at the edge of the pit gave way beneath his feet does not establish negligence on the part of defendant.—Cosgrove v. Filer & Stowell Co., 112 Wis. 457, 88 N. W. 220.

IX. Buildings and Other Structures.

[a] (Ga. 1903) Where no explanation is given as to the cause of the fall of a brick arch on an employé, the maxim "Res ipsa loquitur" applies; and the jury may infer negligence on the part of the owner, either in its original construction or in its subsequent maintenance.—Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S. E. 443.

[b] (Me. 1902) In an action by a servant who was injured by the falling of a stage, the declaration alleged that it was insecure, the iron rods being unable to sustain the weight. After verdict for plaintiff, on motion for new trial, it appeared that there was no affirmative proof of culpable negligence on the part of the defendant. *Held*, that no presumption of such negligence arose from the mere fact that the accident happened.—Pellerin v. International Paper Co., 96 Me. 388, 52 Atl. 842.

[c] (Md. 1905) Where, after the destruction of a building by fire, a brick vault shaft, extending from the cellar to the top story, some 35 feet high, was left standing, but appeared to be solid and not dangerous until it suddenly fell without warning, several days after the fire, and injured plaintiff, a member of a salvage crew working in the débris, the mere falling of the wall was not of itself evidence of negligence on the part of plaintiff's master in charge of the work of salvage.—Gans Salvage Co. v. Byrnes, 102 Md. 230, 62 Atl. 155, 1 L. R. A. (N. S.) 272.

[d] (Mo. 1877) A servant is not entitled to recover damages for injuries caused by the fall of a scaffold on which he has been ordered to work, unless on affirmative proof that it was defectively constructed, that defendant is chargeable with notice of the defects and plaintiff is not, since negligence is not presumed.—Nolan v. Shickle, 3 Mo. App. 300.

[e] (N. Y. 1882) The breaking of a scaffold on which an employé is working is prima facie evidence of the employer's negligence.—Green v. Banta, 48 N. Y. Super. Ct. (16 Jones & S.) 156.

[f] (N. Y. 1901) Plaintiff was injured, while employed to store ice, by the unexplained fall of three sections of a platform. The platform had been in use two weeks. A few hours before the accident plaintiff's fellow servant had rearranged the platform, by hoisting one of the sections which fell. When the accident occurred there were from 8 to 11 men on the platform, and 35 or 40 cakes of ice, weighing 250 pounds each. *Held*, that the doctrine of res ipsa loquitur did not apply, as, while the circumstances may have shown negligence, there was nothing to suggest that it was the negligence of the master rather than that of fellow servants.—Fink v. Slade, 66 App. Div. 105, 72 N. Y. Supp. 821.

[g] (N. C. 1906) In an action for injuries to a servant caused by the slipping and falling of a plank in a gangway, where the evidence shows that the gangway was built by a competent builder, on a proper plan, of good material, and was in good condition up to a few minutes before the plank fell with the plaintiff, the occurrence of the accident carries with it no presumption of negligence on the part of the employer.—Shaw v. Highland Park Mfg. Co., 55 S. E. 433.

[h] (Pa. 1896) The mere fact that a building built and used as a paper warehouse collapses and injures an employé of the lessee is not proof that the lessee negligently overloaded it, the lessee having no notice of any defect in it.—McKenna v. Martin & William H. Nixon Paper Co., 176 Pa. 306, 35 Atl. 131, 38 Wkly. Notes Cas. 503.

[i] (Pa. 1902) The mere giving way of a floor which an employé was washing, she seeing nothing to indicate that it was weak, does not charge the employer with negligence.—Surles v. Kistler, 202 Pa. 289, 51 Atl. 887.

Digitized by Google

X. Vessels.

[a] (U. S. 1906) Where a longshoreman was precipitated into the hold of a vessel and killed through the negligence of his fellow servants in failing to properly set a hatch cover the night before, the mere happening of the accident was insufficient to establish negligence on the part of the master under the doctrine of res ipsa loquitur.—McDonnell v. Oceanic Steam Nav. Co., 143 Fed. 480, 74 C. C. A. 500.

[b] (N. Y. 1903) A servant on a ship, and injured by the fall of a Burton spar—a contrivance used in unloading—cannot recover on the ground of res ipsa loquitur where there is no evidence tending to show any defect in contrivance or material, lack of inspection, or failure to furnish abundant and suitable materials for selection, or the failure to supply competent and skillful workmen, while, on the other hand, there is evidence that there was no defect, that there was daily inspection, and that plenty of materials were sent out after due inspection by the master.—Moran v. Munson S. S. Line, 82 App. Div. 489, 81 N. Y. Supp. 612.

[c] (N. Y. 1907) A shutter used to cover a porthole in a ship was open when an employé attempted to go through it. The shutter fell on him. It might have been so placed that, if left unfastened, its fall would be anticipated, or it might have been thrown back so far as to render its fall impossible, unless by a violent disturbance. *Held*, that proof of the happening of the accident was not evidence of the negligence of the employer in failing to fasten the shutter.—Rende v. New York & T. S. S. Co., 187 N. Y. 382, 80 N. E. 206, reversing judgment (Sup. 1906) 98 N. Y. Supp. 1111.

[d] (Can. 1899) The mere fact that a stop valve of a steamship is broken in some way while the vessel is in port, causing injury to an employé, is not in itself sufficient to create a liability on the part of the owners.—Wyman v. The Duart Castle, 6 Can. Exch. 387.

XI. Places of Work.

[a] (Ark. 1906) An employé, suing for a personal injury, has the burden of showing negligence on the part of the employer in failing to furnish a reasonably safe place in which the employé was required to work, and negligence cannot be inferred merely from the happening of the accident.—St. Louis, I. M. & S. Ry. Co. v. Andrews, 96 S. W. 183.

[b] (Ill. 1906) In an action by a servant for personal injuries alleged to have been caused by failure of the master to furnish a safe place to work, plaintiff, in order to recover, must show that the place was unsafe, that the master in the exercise of ordinary care would have had knowledge of the defect, and that plaintiff did not have such knowledge and did not have equal opportunities of acquiring it.—McCormick Harvesting Mach. Co. v. Zakzewski, 220 Ill. 522, 77 N. E. 147, 4 L. R. A. (N. S.) 848, reversing judgment (1905) 121 Ill. App. 26.

XII. Steam Boiler or Other Explosions.

[a] (U. S. 1881) The explosion of the boiler of a steamboat, causing injury to an employé thereon, is prima facie evidence of negligence.—Posey v. Scoville (C. C.) 10 Fed. 140.

[b] (U. S. 1901) In an action against the owner of a steamboat to recover for the death of a fireman employed thereon through the explosion of a steam drum near which he was working, the fact of the explosion is not sufficient to charge the defendant with liability, but the burden rests on plaintiff to further prove that defendant failed in its duty to exericse reasonable care to make and keep the drum in a safe condition.—In re California Nav. & Imp. Co. (D. C.) 110 Fed. 670.

[c] (Ala. 1885) In an action by an employé against a railroad company to recover damages for injuries caused by the explosion of an engine, negligence cannot be inferred from the fact of injury alone.—Louisville & N. R. Co. v. Allen's Adm'r, 78 Ala. 494.

[d] (Ill. 1895) Where a railroad company constructs its own engines, and employs skilled and careful workmen in their construction, and, after care-

Digitized by Google

ful examination of sheet steel to be used in the boiler, they deem it sufficient, and the boiler explodes on use, it does not show negligence on the part of the company.—Chicago & A. R. Co. v. Du Bois, 65 Ill. App. 142.

[e] (Ill. 1903) Where an engineer is injured by the explosion of a locomotive boiler, in order for the explosion to be prima facie evidence of the company's negligence, it must be proved that the explosion was not due to want of care or negligence of the engineer.—Illinois Cent. R. Co. v. Prickett, 109 Ill. App. 468, judgment affirmed (1904) 210 Ill. 140, 71 N. E. 435.

[f] (Ill. 1904) A presumption of negligence does not arise where a servant is injured as the result of an explosion.—Omaha Packing Co. v. Murray, 112 Ill. App. 233.

[g] (Minn. 1870) Plaintiff, a deck hand on a steamboat, was injured by the explosion of the boiler of another steamboat, while the two boats, operated by defendants, jointly interested in their earnings, were going up the Mississippi side by side. *Held*, that the fact of such explosion was prima facie evidence against defendants that it was caused by their fault or negligence, or that of their servants.—Connolly v. Davidson, 15 Minn. 519 (Gil. 428), 2 Am. Rep. 154.

[h] (N. Y. 1905) Where plaintiff's intestate was killed by the explosion of a blow-off, and it did not appear whether it was caused by a defective coupling, which had served without accident for several years, or by deceased opening a globe valve therein before opening the stopcock, as required by his directions, or because he in some manner improperly or carelessly interfered with an appliance which he had been instructed not to meddle with, the proof of decedent's freedom from contributory negligence was insufficient to sustain a recovery.—Goodhines v. Chase, 100 App. Div. 87, 91 N. Y. Supp. 313.

[i] (Tex.) The doctrine of res ipsa loquitur does not apply to cases of injuries to servants caused by explosions.—(Civ. App. 1904) G. A. Duerler Mfg. Co. v. Dullnig, 83 S. W. 889, judgment affirmed Dullnig v. G. A. Duerler Mfg. Co. (1905) 87 S. W. 332.

(152 Fed. 964.)

McCORMICK v. SOLINSKY.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1907.)

No. 1,633.

BANKRUPTCY—CONTRACT TO FURNISH MONEY FOR COMPOSITION—ILLEGAL CONDITIONS.

A contract by a bank to advance the money to pay a composition made by a bankrupt, in part consideration for which it was to receive payment of its own debt in full, is illegal, and will not support an action by the bank to recover from another creditor the amount he received under the composition, and which by such contract, to which he was a party, he agreed to return to the bank.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 587.]

In Error to the Circuit Court of the United States for the Eastern District of Texas.

F. D. Minor, for plaintiff in error.

A. T. Watts and Lewis F. Chester, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. On the case made, the contract by the Citizens' National Bank of Beaumont, under which it advanced the money to pay the composition to creditors in the bankruptcy of E. N. Brown,

Digitized by Google

was illegal, because a part of the consideration thereof was that the bank's debt against the bankrupt should be paid in full, notwithstanding the composition.

Solinsky was a party to the illegal contract, and therein agreed as a part of the inducement that he would return to the bank the amounts received by him under the composition as one of the creditors of the bankrupt, Brown. The present suit, being one to recover from Solinsky the amounts received by him under the composition, is clearly a suit to recover moneys knowingly advanced under an illegal contract.

The judgment of the Circuit Court is therefore affirmed.

(153 Fed. 1.)

ARMOUR PACKING CO. v. UNITED STATES. SWIFT & CO. v. SAME. MORRIS & CO. v. SAME. CUDAHY PACKING CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. April 29, 1907.)

Nos. 2,471, 2,472, 2,473, 2,474.

1. REBATES—CARRIERS — REGULATION OF RATES — ELKINS ACT — JURISDICTION WHEREVER TRANSPORTATION CONDUCTED THEREUNDER.

The giving or receiving of a rebate or concession, whereby property in interstate or foreign commerce is transported at a less rate than that legally filed and published, denounced by the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), is a continuous crime judicable in any court of the United States having jurisdiction of crimes through whose district the transportation is conducted.

2. CRIMINAL LAW—CONTINUING CRIME PUNISHABLE IN EACH JURISDICTION TO WHICH IT EXTENDS.

A continuing crime is a continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long it may occupy.

Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each.

Though complete in the jurisdiction where first committed, it may continue, be committed, and punished in another jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 220.]

3. CARRIERS—REBATES—CONCESSION FROM PART OF RATE RENDERS TRANSPORTATION THEREUNDER ILLEGAL.

A rebate or a concession from a part of a single rate, whereby property is transported thereunder at a less rate than the established rate, is a concession from the entire rate, and renders all transportation thereunder illegal.

4. SAME—REBATES—INLAND RATES ON THROUGH EXPORTS AND IMPORTS REQUIRED TO BE FILED AND PUBLISHED.

The rates of transportation from places in the United States to ports of transhipment, and from ports of entry to places in the United States, of property in foreign commerce carried under through bills of lading, are required to be filed and published by the amended interstate commerce act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).

If carried under an aggregate through rate which is the sum of the ocean rate and the rate from or to a place in the United States to or from

Digitized by Google

the port of transhipment or of entry, the latter rate is required to be filed and published.

If carried under a joint through rate by virtue of a common control, management, or arrangement of the inland and ocean carriers, the joint rate is required to be filed and published.

5. COMMERCE—REBATES—INTERSTATE COMMERCE ACT NOT VIOLATIVE OF CONSTITUTION.

The amended interstate commerce act of 1887, thus construed, neither lays a tax or duty on articles exported from any state, nor gives a preference to the ports of one state over those of another, within the meaning of paragraph 5 of section 9 of article 1 of the Constitution, and it is not obnoxious thereto.

6. CARRIERS—REBATES—"DEVICE" OF ELKINS ACT IMMATERIAL—INDICTMENT SUFFICIENT WITHOUT PLEADING IT.

The giving or receiving of the rebate or concession, whereby property in interstate or foreign commerce is transported at less than the established rate, is the essence of the offense denounced by the pertinent paragraph of the Elkins act.

The "device" by which the concession or transportation is brought about is not an essential element of the crime, and it is unnecessary to plead it in an indictment.

The meaning of the clause "by any device whatever" in that paragraph is directly or indirectly, in any way whatever.

7. CRIMINAL LAW—INDICTMENT—REQUISITE AVERMENTS.

An indictment must set forth facts which the pleader claims constitute the transgression, and every essential element of it, with such clearness and certainty as (1) to advise the accused of the charge he has to meet, and to give him a fair opportunity to prepare his defense, (2) to enable him to avail himself of the judgment thereon in defense of another prosecution for the same offense, and (3) to qualify the court to determine whether or not the facts there stated are sufficient to support a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 180-182.]

8. CONTRACTS—LAWS READ INTO.

The laws upon the subject of a contract are read into and become a part thereof to the same extent as though they were written into its terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 750.]

9. CARRIERS—REBATES—CONTRACT TO MAINTAIN ESTABLISHED RATE INEFFECTIVE AFTER HIGHER RATE ESTABLISHED—NO DEFENSE TO CHARGE OF RECEIVING LESS THAN FILED AND PUBLISHED RATE.

A contract between a carrier and a shipper to transport the latter's goods in interstate or foreign commerce at the then established rate for a definite time is ineffective after a higher rate has been filed and published as required by law.

The time during which a rate different from the agreed rate is established by filing and publishing is excepted from the term of such a contract by virtue of the national acts to regulate commerce which are a part thereof.

Such a contract constitutes no defense to a charge of giving or receiving a rebate or concession from the filed and published rate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 94.]

10. CRIMINAL LAW—INTENT—SIMPLE PURPOSE TO DO FORBIDDEN ACT WHICH IS NOT MALUM IN SE IS SUFFICIENT.

The only criminal intent requisite to a conviction of an offense created by statute, which is not malum in se, is the purpose to do the act in violation of the statute. No moral turpitude or wicked intent is essential to a conviction of such a crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 22.]

(Syllabus by the Court.)

Digitized by Google

In Error to the District Court of the United States for the Western District of Missouri.

In the statement and opinion in these cases the Armour Packing Company's case alone will be treated, because the four cases were tried upon agreed statements, and their facts are so similar that the questions of law they present are identical.

The packing company was indicted and tried for, and was convicted of, a violation of the Elkins act to further regulate commerce of February 19, 1903 (chapter 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]) in the District Court for the Western District of Missouri upon these agreed facts: The Chicago, Burlington & Quincy Railroad Company, a corporation, was a common carrier engaged in the transportation of property through the states of the nation and for export to foreign countries by rail over its own road and over other railroads under contracts and arrangements with connecting carriers from Kansas City, in the state of Kansas, into and through the Western district of Missouri, to the city of New York. The packing company was a corporation engaged at Kansas City, in the state of Kansas, in packing meat products and shipping them throughout the United States and to foreign countries. Its shipments to foreign countries were delivered to the Burlington company at Kansas City, were delivered by one of the Burlington company's connecting carriers to an ocean steamer at New York, and were handled exclusively by the carriers, rail and steamship, from the time they were delivered to the Burlington company at Kansas City until they were delivered to the shipper at the export destination. The shipment which is the subject of this prosecution was thus shipped, handled, and delivered.

From May 9, 1905, until August 6, 1905, tariffs and schedules and joint tariffs and schedules duly filed, published, and posted, showed that the proportion of the rate on provisions of the character described herein shipped as export shipments from Kansas City, Kan., to foreign countries, was 23 cents per 100 pounds from all points on the Mississippi river to New York.

On June 16, 1905, the proprietors of the Wilson line of ocean steamers agreed with the packing company to carry these provisions from New York to Christiania, Norway, for 19.93 cents per 100 pounds, and a copy of this contract was delivered to the Burlington company.

On June 17, 1905, the Burlington company agreed with the packing company to carry for it until December 31, 1905, products of this character shipped for export at the then filed and published rate, the proportional part of which from the Mississippi river to New York was 23 cents per 100 pounds.

On August 6, 1905, the Burlington company and its connecting railway carriers filed with the Interstate Commerce Commission an amendment to their tariffs and schedules, which was duly published and posted, and which made a tariff or rate from Kansas City, Kan., to New York, for these products, the proportional part of which for their carriage from the Mississippi river to New York was 35 cents per 100 pounds.

Prior to August 6, 1905, shipments were made by the packing company for export and were carried by the Burlington company and its connecting carriers according to the terms of the contract of June 17, 1905, and at the then filed and published rate. After the amendment of the schedules of August 6, 1905, and on August 17, 1905, the packing company delivered at Kansas City, Kan., to the Burlington company, under the contract of June 17, 1905, for transportation to Christiania, Norway, by way of the latter's railroad and via railroads of its connecting carriers to New York, and thence by the Wilson line of steamships to Christiania, under the contract of the packing company with the owners of that line, 67 tierces of oleo oil, which weighed 29,365 pounds, and the Burlington company received, agreed to deliver this oil to the order of the packing company at Christiania, Norway, and issued to it a through bill of lading therefor for 52.93 cents per 100 pounds, which included the 19.93 cents per 100 pounds agreed by the packing company to be paid to the Wilson line, and left 33 cents per 100 pounds for the transportation from Kansas City, Kan., to New York. The Burlington company and its connecting railway carriers thereupon transported this oil over their railroads from Kansas City, Kan., through the Western district of Missouri,

Digitized by Google

to New York, where they delivered it to a steamship of the Wilson line. The packing company paid to the Burlington company the full 52.93 cents per 100 pounds for the entire carriage from Kansas City, Kan., to Christiania, Norway. This 52.93 cents per 100 pounds was made up so that the proportionate part of this rate for the carriage from the Mississippi river to New York was 23 cents per 100 pounds. The packing company did not at any time know how the rate was apportioned or made up or divided among the respective railway carriers or points, but it knew that the agreed steamship rate was 19.93 cents per 100 pounds, and hence that 33 cents per 100 pounds was the aggregate amount paid and received for the transportation of the property from Kansas City to New York, and it knew the filed, published, and posted rate for this product established by the amendment of August 6, 1905, the proportional part of which from the Mississippi river to New York was in fact 35 cents per 100 pounds.

The oleo oil was one of the products which the Burlington company agreed to carry, and which it did carry under its contract of June 17, 1905; "the defendant company shipper contending and insisting that said amendment increasing the tariff rate did not and could not abrogate or impair the terms of said contract." One of the connecting carriers objected to transporting this oil at the rate specified in this contract, but the Burlington company insisted that it should be so carried. The result was that the property was transported at a rate the proportional part of which for the carriage between the Mississippi river and New York was 12 cents per 100 pounds less than the part of the rate established by the amendment of August 6, 1905, which was proportionate to that part of the carriage. The packing company was indicted and tried for, and was convicted of, accepting and receiving this concession of 12 cents per 100 pounds in respect of the transportation of this oleo oil in foreign commerce by the Burlington company and its connecting carriers, whereby this property was transported from Kansas City to New York, through the Western district of Missouri, at a less rate than that named in the tariffs published and filed by the Burlington company and its connecting carriers.

Frank Hagerman and John C. Cowin, for plaintiff in error in each case (A. R. Urion, on the brief in No. 2,471, Henry Veeder, on the brief in No. 2,472, and M. W. Borders, on the brief in No. 2,473).

A. S. Van Valkenburgh (Leslie J. Lyons, on the brief), for the United States.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

1. The shipper delivered its goods to the Burlington company, the carrier, obtained its through bill of lading from Kansas City to Christiania, Norway, received its concession, and paid the through rate, less than that named in the tariffs filed and published by the carriers, in the city of Kansas City, in the state of Kansas. By these acts the transportation of this property at this less rate by the Burlington company and its connecting carriers from Kansas City into and through the Western district of Missouri to New York was caused, but the carriage was conducted by the railroad companies alone.

Counsel for the shipper insist that the District Court of the Western district of Missouri was without jurisdiction of its offense, because its crime was not committed in that district, but was complete in the district of Kansas, and because no concession from that part of the rate filed and published which was proportionate to the car-

Digitized by Google

riage through the Western district of Missouri was charged in the indictment or proved.

If the shipper's offense was complete in the state of Kansas, it may nevertheless have continued and have been committed in the Western district of Missouri also. It is not essential to a continuing crime that every element requisite to its commission in the second jurisdiction wherein it continues shall exist in the jurisdiction in which it is first committed. Larceny is a continuing crime. One who steals in one jurisdiction and carries the stolen property into another may be indicted, tried, and punished in the latter under statutes to that effect, notwithstanding the constitutional requirement that the accused shall be tried in the county or district in which the crime is committed, and this because the carrying into the second jurisdiction is a continuance of the effect of the original taking. Commonwealth v. Macloon, 101 Mass. 1, 5, 6, 100 Am. Dec. 89; People v. Burke, 11 Wend. (N. Y.) 129; Hemmaker v. State, 12 Mo. 453, 51 Am. Dec. 172; 2 Wharton on Conflict of Laws (3d Ed.) §§ 826, 826a. It is said that this rule is based on the legal assumption that where the property has been feloniously taken every act of removal may be regarded as a new taking and asportation. Commonwealth v. Uprichard, 3 Gray (Mass.) 434, 436, 63 Am. Dec. 762; State v. Smith, 66 Mo. 61, 62. But this assumption is only a legal fiction, and, whether made or not, the fact remains that the offense is complete where the felonious taking occurs, and the subsequent asportation to another county or state is not an essential ingredient of the crime in the first jurisdiction, while the felonious taking and its continuing effect are indispensable elements of the offense in the jurisdiction to which the stolen property is carried. Embezzlement is a continuing crime. It may be prosecuted and punished in any jurisdiction where there is liability and failure to account for and pay over the money. In re Richter (D. C.) 100 Fed. 295, 298; Commonwealth v. Parker, 165 Mass. 526, 43 N. E. 499; State v. Bailey, 36 N. E. 233, 236, 50 Ohio St. 636. But the offense is complete in the jurisdiction in which the original conversion is committed, and no subsequent acts in any other jurisdiction are essential elements thereof. The general principle that one who commits a criminal act in one county, state, or district may be held liable for its continuous operation in another to which its effect extends, is established by these and many other authorities, such as those involving the maintenance of a nuisance in one county which affects property in another (Bulwer's Case, 7 Co. 2b, 3b; 2 Hawk. c. 25, § 37; Com. Dig. "Action," N, 3, 11; Abbott, C. J., in King v. Burdette, 4 B. & Ald. 175, 176; Thompson v. Crocker, 9 Pick. [Mass.] 59; Stillman v. Mfg. Co., 3 Woodb. & Min. 538, Fed. Cas. No. 13,446) and those involving the publication of a libel in a newspaper in one jurisdiction which circulates in another (Commonwealth v. Blanding, 3 Pick. [Mass.] 304, 15 Am. Dec. 214), and yet in all these cases the offense may be complete in the jurisdiction in which it is first committed, and still be indictable and punishable in those to which its continuing operation and effect extend.

A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent

Digitized by Google

force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each. Wharton's Criminal Pleading & Practice (9th Ed.) §§ 473, 474; People v. Sullivan, 33 Pac. 701, 702, 704, 9 Utah, 195. The transportation of the goods in this case into and through the Western district of Missouri, at the illegal through rate, was the continuing operation and effect in that district of its primary cause, the receipt of the concession and the delivery of the oil by the shipper to the carrier thereunder for transportation in foreign commerce, and even if the shipper's offense was complete in Kansas, it may have been committed in Missouri also, where its operation continued and took effect.

Nor did the fact that no concession was charged or proved from the part of the established rate proportionate to the carriage through the Western district of Missouri extract from that part of the transportation the vice of illegality. The entire transportation from Kansas City to New York was procured by the packing company by accepting a single unlawful concession from that part of the through established rate proportionate to the carriage east of the Mississippi river, but the transportation from Kansas City to New York, and the rate paid therefor, were each single, undivided, and through, and the vice of the illegality in any part of either was unavoidably a vice in the whole and every part of it, so that the carriage into and through the Western district of Missouri under this entire unlawful through rate was as illegal as the transportation over any other part of the route.

Counsel invoke the sixth article of amendments of the Constitution and the inviolable rule of the common law that every accused person shall enjoy the right to a trial in the jurisdiction in which the offense was committed, and the court freely concedes and confirms the position that, if the offense of the packing company was not committed in the Western district of Missouri, the court below was without jurisdiction of this case, and its judgment must be reversed. If the offense was not there committed, the Congress was undoubtedly without power to make it there judicable. They cite: U. S. v. Fowkes, 3 C. C. A. 394, 398, 53 Fed. 13, 17, in which a railroad claim agent in Philadelphia was indicted in Missouri for charging, and receiving from a shipper for the transportation of goods from Philadelphia to Missouri, less than the established rates under the tenth section of the act to regulate commerce approved February 4, 1887 (chapter 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3161]), and an application was made to the court in Pennsylvania for his removal to Missouri for trial on the ground that his case was triable there, under section 731 of the Revised Statutes [U. S. Comp. St. 1901, p. 585], because his offense was begun in the Third circuit and completed in the Eighth circuit, although nothing was done in the latter, save that the transportation was there completed, and the court held that the offense was commenced and finished in the state of Pennsylvania and that the court in Missouri was without jurisdiction of it. Davis v. U. S., 43 C. C. A. 448, 104 Fed. 136, in which the defendant was indicted in Texas for committing the fraud of

Digitized by Google

obtaining by false billing and false representation at Cincinnati in the state of Ohio the transportation of goods from that city to Dallas, in the state of Texas, at less than the established rates, in violation of section 10 of the interstate commerce act, as amended by Act March 2, 1889, c. 382, 25 Stat. 858 [U. S. Comp. St. 1901, p. 3160] and an application for his removal to Texas for trial was presented to the court in Ohio on the ground that the offense was begun in that circuit and ended in the Fifth circuit, under section 731, although nothing occurred in the latter but the completion of the transportation, and the Circuit Court of Appeals of the Sixth Circuit held that the fraud was begun and completed in Cincinnati, and that the offense was not judicable in Texas. Judge Day, now Mr. Justice Day of the Supreme Court, in delivering the opinion of the court, said of the provision, amendatory of the act, denouncing the fraud of false billings: "It is not the transportation of the goods which is prohibited and punished, but the obtaining of the transportation by means of false and fraudulent conduct, which is the gist of the offense. What is it, then, to obtain transportation in the sense of this statute? We think that false billing or other misrepresentation of the goods, as stated in the act, which results in their being received by the carrier under a contract of carriage thus fraudulently obtained, is the obtaining of transportation within the meaning of the statute. Then the fraudulent conduct of the shipper has borne its fruit, and every act and intent which constitutes the offense is complete." 43 C. C. A. 451, 104 Fed. 139. But he also said: "If the carriage of the goods was the thing aimed at in this statute, and such was to have been deemed fraudulent per se, the crime might be regarded as a continuing one." Page 453 of 43 C. C. A., page 142 of 104 Fed. In re Belknap (D. C.) 96 Fed. 614, 616, in which, on an indictment for a violation of the same paragraph of the statute, the District Court of Kentucky reached the same conclusion. U. S. v. Conrad (C. C.) 59 Fed. 458, 462, 463, where the court held that the offense of depositing a lottery ticket or sending it in the mails is complete in the district in which it is deposited or sent, and is not indictable in the district where it is delivered; but that the offense of delivering it by mail may be prosecuted in the district in which it is delivered to the addressee. Dealy v. U. S., 152 U. S. 539, 547, 14 Sup. Ct. 680, 38 L. Ed. 545, in which the Supreme Court held that the offense of conspiracy is complete where the conspiracy is formed, although the overt act is done elsewhere, and many cases in which statutes of states which by their terms authorized the indictment and trial of offenses, which were not continuing, in jurisdictions in which they were not committed, have been held unconstitutional and void. Ex parte Slater, 72 Mo. 102; State v. McGraw, 87 Mo. 161; State v. Hatch, 91 Mo. 568;[1] State v. Anderson, 191 Mo. 134, 144, 145, 90 S. W. 95; Craig v. State, 3 Heisk. (Tenn.) 227; State v. Smiley, 98 Mo. 605, 12 S. W. 247; Dempsey v. State, 22 S. E. 57, 94 Ga. 766; Dougan v. State, 30 Ark. 41; Armstrong v. State, 41 Tenn. 339; Swart v. Kimball, 43 Mich. 443, 5 N. W. 635; Kirk v. State, 41 Tenn. 345; State v. Denton, 46 Tenn. 539; Wheeler v. State, 24 Wis. 52.

[1] 4 S. W. 502.

Digitized by Google

On the other hand, in Re Palliser, 136 U. S. 257, 267, 10 Sup. Ct. 1034, 34 L. Ed. 514, in which the offense was an offer of money or a tender of a contract for the payment of money, contained in a letter mailed in New York and addressed to a postmaster in Connecticut to induce him to violate his official duty, the Supreme Court said:

"But there can be no doubt at all that, if any offense was committed in New York, the offense continued to be committed when the letter reached the postmaster in Connecticut, and that, if no offense was committed in New York, an offense was committed in Connecticut."

And in Re Huntington (D. C.) 68 Fed. 881, and in Griffee v. Burlington, etc., R. R. Co., 2 I. C. C. R. 301, it was held that the offense of giving an undue preference or advantage to a particular person, in violation of section 3 of the interstate commerce act (24 Stat. 380, c. 104 [U. S. Comp. St. 1901, p. 3155]) was not complete where a free pass had been delivered, unless there was also actual transportation upon the pass.

The opinions in these numerous cases are instructive and interesting; but they are neither controlling nor very persuasive upon the issue it is necessary for us to determine here, because none of the courts which delivered them considered or treated of the act or of the offense here under consideration, and arguments by analogy should always be indulged with caution. In the light of these authorities, two questions condition the jurisdiction of the court below: Was the offense here charged a continuing crime? If it was not, was the actual transportation of the goods an indispensable element of the offense? We turn to the Constitution and to the acts of Congress for the answers. The act which denounces this offense was passed in 1903, six years after the offense of the giving of concessions from the lawful rates by carriers had been created, and four years after the offense of fraudulently obtaining transportation by shippers at less than the regular rates by false representations was established. It was enacted under the power to regulate commerce with foreign nations and among the several states granted to the Congress by article 1 of section 8 of the Constitution. The subject of the act was that part of this commerce which consisted of the transportation of property in it. Its object was to regulate this transportation. There is, there can be, no doubt that the Congress had plenary power, under this commercial clause of the Constitution, to prohibit the transportation of property in interstate or foreign commerce at any less rates than those filed and published under the interstate commerce act of 1887 and its amendments, to make such transportation a continuing crime, to prescribe the penalty for it, and to give to every federal court which had jurisdiction of crimes through whose district any part of this transportation is conducted complete jurisdiction to try, and, if convicted, to punish any person or corporation charged with it. Has the Congress exercised this power? It enacted that:

"It shall be unlawful for any person, persons or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier, subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any de-

Digitized by Google

vice whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. * * * Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted." 32 Stat. c. 708, p. 847 [U. S. Comp. St. Supp. 1905, p. 599].

The offense of the shipper here charged is receiving a concession whereby any property in interstate or foreign commerce shall be transported at less than the legally established rate. Every part of the transportation thus caused is unavoidably violative of this act and illegal, and is necessarily the continuing operation and effect of the unlawful receipt of the concession whereby the carriage is induced. The last clause of the portion of the act quoted above, which, in addition to the court in whose district the violation of the act is committed, confers jurisdiction upon every other court of the United States, which has criminal jurisdiction, through whose district the transportation is conducted, is unconstitutional and void if the offense is not a continuing crime, but valid and effective if it is, and that construction which validates and sustains must be preferred to that which strikes down and paralyzes so plain a provision of a statute. The transportation of the property in the case in hand from Kansas City to New York into and through the Western district of Missouri at a through rate less than that established under the law was the continuing operation and effect of the receiving of the concession and the delivery of the property thereunder by the shipper. These considerations convince that the Congress intended to make, and that by the provision of the act quoted it did make, the offense here charged a continuing crime indictable and punishable in every federal court having jurisdiction of crimes through whose district the illegal transportation is conducted, that the offense in this case is of this nature, that, if the charge in the indictment is true, this offense continued in the illegal transportation it produced into and through the Western district of Missouri, so that it was there committed, and that the court below had jurisdiction of this offense and of the packing company that was charged with its commission. This conclusion renders it unnecessary to determine whether or not the transportation is an indispensable element of the offense in the district in which the concession is received and the goods are delivered to the carrier. But the fact is noted in passing that the giving or receiving of a concession, whereby property is transported at a less rate than that established, is not the only offense created by this act, but also the giving or receiving any concession whereby "any other advantage is given or discrimination is practiced."

2. The concession denounced by the Elkins act is one whereby property in interstate or foreign commerce is transported at a less rate than that required to be filed and published by the amended interstate commerce act of 1887. One of the positions of counsel for the packing company is that no offense was charged or proved against it in this case because railroad rates in the United States upon property in foreign commerce transported from places in the United States to ports of transhipment and thence to foreign countries under through bills of

Digitized by Google

lading are not required to be filed or published under the act of 1887, and that, if that act contains such a provision, it is violative of article 1, § 9, par. 5, of the Constitution.

In Texas & Pac. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 211, 16 Sup. Ct. 666, 40 L. Ed. 940, the Supreme Court said of this statute:

"The scope or purpose of the act is, as declared in its title, to regulate commerce. It would, therefore, in advance of an examination of the text of the act, be reasonable to anticipate that the legislation would cover, or have regard to, the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a partial treatment of the subject. * * * Addressing ourselves to the express language of the statute, we find, in its first section, that the carriers that are declared to be subject to the act are those 'engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment, from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.' It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state), as well that between the states and territories, as that going to or coming from foreign countries. In a later part of the section, it is declared that 'the term transportation shall include all instrumentalities of shipment or carriage.'" Page 212 of 162 U. S., page 672 of 16 Sup. Ct. (40 L. Ed. 940).

The second, third, and fourth sections of the act forbid unjust discrimination, unreasonable preference, the receipt of greater conpensation for a shorter than for a longer haul by carriers engaged in inland transportation of property in foreign commerce as well as in interstate commerce.

The first sentence of the sixth section reads:

"That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act."

The first section of the act defines and subjects to its provisions the transportation by rail, and by rail and water combined, of property in foreign commerce shipped from any place in the United States to a foreign country and carried from such place in the United States to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry. And it expressly provides that all the provisions of the act shall apply to any common carrier engaged in such transportation and to every instrumentality thereof. It is contended that, although the act may apply to the carriage of property in foreign commerce when consigned from a place in the United States to the port of transhipment for export, to be there again consigned to its destination in the

Digitized by Google

foreign country, yet it has no application to the transportation of such property under a through bill of lading from the place of the origin of the carriage to the foreign destination. The proposition cannot be sustained. The act is general, comprehensive, includes within its express terms all transportation of property in foreign commerce from the place of origin in the United States to the port of transhipment, and it contains no exception of such carriage under through bills of lading. As the Congress made no such exception, the conclusive presumption is that it intended to make none, and it is not the province of the judicial department to do so. Omaha Water Co. v. City of Omaha, 77 C. C. A. 267, 147 Fed. 1, 13; Madden v. Lancaster County, 12 C. C. A. 566, 572, 65 Fed. 188, 194; Wrightman v. Boone County, 31 C. C. A. 570, 572, 88 Fed. 435, 437; Union Central Life Ins. Co. v. Champlin, 54 C. C. A. 208, 210, 116 Fed. 858, 860.

The sixth section proceeds to require all common carriers subject to its provisions to file and publish schedules and tariffs and joint tariffs and schedules of their rates for all transportation, subject to the act, and closes with the declaration that if any carrier fails to file or publish its schedules or tariffs, as provided in that section, the commissioners may apply to the court "to restrain such common carrier from receiving or transporting property among the several states and territories of the United States, or between the United States and adjacent foreign countries, or between ports of transhipment and of entry and the several states and territories of the United States, as mentioned in the first section of this act until such common carrier shall have complied with the aforesaid provisions of this section of this act." The Congress was evidently of the opinion that this section required carriers engaged in the transportation of property in foreign commerce from places in the United States to ports of transhipment and from ports of entry to places in the United States to file and publish the rates under which this property moved. Otherwise, it would not have authorized the issue of an injunction to restrain them from receiving or transporting property between ports of transhipment and of entry and the several states and territories of the United States, as mentioned in the first section of the act, until they filed and published their rates in compliance with section 6. The Elkins act does not fail to recognize the fact that the interstate commerce act regulates the transportation of goods in foreign, as well as in interstate, commerce. It declares that it shall be unlawful to receive any concession "in respect of the transportation of any property in interstate or foreign commerce subject to such act to regulate commerce," whereby any property shall be transported at a less rate than that filed and published as required thereby.

Counsel argue with much force and great ability that the act does not apply to through export shipments (1) because it does not regulate all commerce or all carriers, but it regulates all carriers by rail, and by rail and water combined, who transport property in foreign commerce from or to places in the United States to or from ports of transhipment or of entry; (2) because ocean rates continually and greatly vary so that through export rates cannot have any permanency, and so cannot be established by filing and publishing, but, if such through

Digitized by Google

rates may not be thus established, the inland rates to and from the ports can and must be, and to these the ocean rates may be, added, as in the case in hand, and if the through export rates can be thus established, and they are so, they may be filed and published; (3) because the act of 1887 applies to foreign commerce between the ports of transhipment or of entry and the places of its origin or destination in the United States only, but the act requires the rates between those places to be established, filed, and published. If those rates are separate from the ocean rates, they may undoubtedly be separately filed and published, and the ocean rates may be added to make aggregate through rates, as was done in the case under consideration. If by agreement or arrangement between the inland and the ocean carriers or by common control the inland rates become parts of joint through rates, then the latter rates become the rates of transportation to or from the ports of transhipment from or to the places of the origin or destination of the traffic in the United States, and they thereby fall within the terms and the reason of the law.

The history of this legislation, the evils it was intended to remedy, the objects it was enacted to secure, the instability of the ocean rates, the inconvenience of establishing rates of transportation for property in foreign commerce, the necessary restraint upon this commerce which the subjection of its rates to this act will unavoidably impose and the conceded rule that "laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. * * * Before a man can be punished, his case must be plainly and unmistakably within the statute" (U. S. v. Brewer, 139 U. S. 278, 288, 11 Sup. Ct. 538, 35 L. Ed. 190)—have been ably and persuasively presented in support of the argument that the rates of through export traffic are not within these acts. But where the language of a law is clear, and the signification of its terms is certain, argument from its history and purpose, from its possible or even probable evil effects, and from the inconvenience of complying with it and attempted judicial construction of its expressions, serve only to create doubt and to confuse the judgment. They tend to obscure, rather than to elucidate, the meaning of the statute, and the legislative body must be presumed to have intended what it has expressed. Knox Co. v. Morton, 15 C. C. A. 671, 673, 68 Fed. 787, 789; Shreve v. Cheesman, 16 C. C. A. 413, 416, 69 Fed. 785, 788. The plain terms of the act of 1887, their certain meaning, and the lucid and authoritative interpretation of them by the Supreme Court, which has been quoted, leave no doubt upon this question, and our conclusion is that common carriers subject to the provisions of the act of 1887 to regulate commerce, who are engaged in the transportation of property in foreign commerce under through bills of lading, are required by that act to file and publish their rates for the carriage of the property from its place of shipment in the United States to the port of transhipment and from its port of entry to its place of destination in the United States. If it is carried under an aggregate through rate, which is the sum of the ocean rate and the rate from or to the place in the United States to or from the port of transhipment or of entry, the latter rate is required to be published. If it is carried under a joint through rate by virtue of a com-

Digitized by Google

mon control, management, or arrangement of the inland and ocean carriers, the joint rate must be filed and published. Texas & Pac. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 211, 212, 220, 16 Sup. Ct. 666, 40 L. Ed. 940; N. Y. Pr. Ex. v. N. Y. Cen. & Hud. Riv. R. R. Co., 3 Interst. Com. Com'n R. 137; New Orleans Cot. Exch. v. Louisville, N. O. & Tex. R. Co., 41 Interst. Com. Com'n R. 694, 699; In re Tariffs on Export and Import Traffic, 10 Interst. Com. Com'n R. 55, 63, 64, 66, 68, 76, 81.

In the case at bar the property was shipped under a through bill of lading at a through rate which was the sum of the ocean rate agreed upon between the proprietors of the steamship line and the shipper and a railroad rate from Kansas City to the point of transhipment, which was less than the established rate which was required to be and which in fact had been filed and published under the act of 1887. The shipper received a concession of 12 cents per 100 pounds from the part of the established and published rate proportional to the carriage between the Mississippi river and New York, and this constituted an offense under the Elkins act.

But it is said that, if this be the meaning of the amended act of 1887, it is in conflict with article 1, § 9, par. 5, of the Constitution, because it burdens exportation, and gives a preference to the ports of the states reached by the rivers, canals, bays, and sounds over those not thus situated. This burden is alleged to be imposed by the requirements that these rates shall be uniform, filed, and published, only increasable on 10 days' notice, and diminishable on 3 days' notice, and it is freely conceded that these provisions of the act perceptibly impede and restrain both foreign and interstate commerce. But the paragraph of the Constitution first invoked reads: "No tax or duty shall be laid on articles exported from any state." Do the restrictions of the amended interstate commerce act constitute a tax or duty on exports within the meaning of this prohibition? The argument in support of an affirmative answer is that freedom of exportation cannot be impeded in any degree by any legislation, and this contention is founded on these excerpts from the opinion of the Supreme Court in Fairbank v. U. S., 181 U. S. 283, 294, 295, 21 Sup. Ct. 648, 45 L. Ed. 862. In speaking of the earlier decision of that court in Almy v. California, 24 How. 169, 16 L. Ed. 644, to the effect that a tax or duty on a bill of lading was, in substance, a tax or duty on the article shipped, Mr. Justice Brewer, in delivering the opinion of the court, said:

"In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction, cannot be accomplished indirectly by legislation which accomplishes the same result."

And again, at page 295 of 181 U. S., page 648 of 21 Sup. Ct. (45 L. Ed. 862), he remarked:

"As the states cannot directly interfere with the freedom of imports, they cannot by any form of taxation, although not directly on the importation, restrict such freedom; Congress alone having the power to prescribe duties therefor. In like manner, the freedom of exportation being guarantied by the Constitution, it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance."

Digitized by Google

But the question under consideration in that case was whether or not a stamp tax on a foreign bill of lading was a tax or duty on the articles described in the bill, and hence a duty on exports, and in conflict with this constitutional provision. To that issue the remarks of the court were addressed, and upon it they were pertinent and authoritative. But they are neither relevant to, nor controlling upon, the question whether or not the Congress may impose incidental restrictions upon foreign commerce under its constitutional power to regulate it. If it may not, then it may not exercise that power, for there can be no regulation without some restriction.

It is a burden or restraint upon exportation by virtue of a tax or duty, and by that alone that is forbidden by the clause of the Constitution here under consideration. The interstate commerce act and its amendments impose no tax or duty upon either foreign or interstate commerce. They were not enacted by virtue of the power of taxation for the purpose of raising a revenue and they raise none.

Again, it is a tax or duty on exportation imposed either directly or indirectly on account of the fact that the articles taxed are exported or are intended for export, and that alone that is obnoxious to this constitutional inhibition, and the restraint of the interstate commerce acts was not imposed upon the transportation of property in foreign commerce because it is exported or intended for export, but upon articles in foreign and interstate commerce alike for the sole purpose of regulating both alike pursuant to the commercial clause of the Constitution. Turpin v. Burgess, 117 U. S. 504, 506, 6 Sup. Ct. 835, 29 L. Ed. 988; Cornell v. Coyne, 192 U. S. 418, 427, 24 Sup. Ct. 383, 48 L. Ed. 504.

The second clause of the paragraph of the Constitution called to our attention reads: "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." Property in foreign commerce which may be transported entirely by water from and to places in the United States on its rivers, canals, sounds, and bays to and from ports of transhipment or of entry is free from, while property in foreign commerce which can be carried from and to the places in the United States to and from ports of transhipment or of entry by rail or partly by rail and partly by water only is subject to the restrictions and burdens of the amended interstate commerce law. Does that law thereby give a preference to the ports of one state over those of another? Counsel contend that this question should be answered in the affirmative, because ports reached by water routes from inland points reap the great and obvious advantage of the freedom of their shippers to contract for the entire carriage, while ports reached from inland places by rail or by rail and water only are deprived of this freedom for their shippers, who must transport their articles subject to the burdens of established uniform inland rates changeable only after ten or three days' notice. The argument might be forceful and persuasive, if addressed to the policy or the justice of the law; but these issues were within the competence of, and have been conclusively determined by, the Congress. The only question which the judiciary can consider is whether or not

Digitized by Google

the provisions of the act here assailed are unconstitutional. The paragraph of the Constitution before us was enacted for the purpose of preventing Congress from so exercising its power to regulate commerce as to give to one state an advantage over another state by the enactment of a regulation which would prefer the ports of the former to those of the latter. The purpose and the extent of its inhibition are clearly expressed in its terms. It does not forbid a preference of ports of various states reached by inland water routes over those reached by rail, or a preference of those reached by many, over those reached by few, railroads or steamboats, but only those of one state over those of another. It forbids the preference of the ports of one state because they are located in that state over the ports of another state because they are situated in the latter state. No such preference was intended or effected by the act of 1887 and its amendments, and for this reason these acts do not fall under this constitutional inhibition.

Moreover, the advantage of which complaint is here made is rather that of geographical position, than of legislation. Congress cannot by any law make the advantages of other ports equal to those of one at the mouth of a great river. The alleged preference was not created by any positive enactment for that purpose, nor was it either one of the objects or the chief effect of this legislation. It is but one of the remote and incidental effects of a general, comprehensive, and undoubtedly beneficial regulation of the transportation of property by rail in the foreign and interstate commerce of the nation under the plenary authority granted by the Constitution. Acts of Congress which are passed in the exercise, and which are within the scope, of one of its undoubted powers, may not be held unconstitutional on account of remote and incidental effects which are clearly within them. Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, 434, 15 L. Ed. 435; South Carolina v. Georgia, 93 U. S. 4, 13, 23 L. Ed. 782.

The interstate commerce act of 1887 and its amendments are not in conflict with article 1, § 9, par. 5, of the Constitution, because they do not lay any tax or duty on articles exported from any state, nor give any preference to the ports of one state over those of another within the meaning of that paragraph.

3. The Elkins act declares the offense of which the defendant was convicted to be the receiving of any concession in respect of the transportation of any property in interstate or foreign commerce, "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed," as required by the interstate commerce act and its amendments. The judgment of conviction is assailed on the inconsistent grounds that the device by which the property was transported at a less rate than that published and filed was not pleaded in the indictment, and that the court charged the jury that it was essential for them to find that the shipper secured the concession as the result of such a device before they could convict. The latter objection is based on general exceptions to portions of the charge, which declare that both the device and the guilty intent of the defendant are essential to conviction. These exceptions failed to specify or inform the court below whether counsel challenged this charge because in their opinion the guilty intent was

Digitized by Google

immaterial, or because they thought that the device was unimportant. They now insist, and for the purposes of this decision it is conceded, that a criminal intent on the part of the defendant was indispensable to its conviction, and that the proposition of law embodied in the portion of the charge assailed which declares that rule is correct. But a general exception to a portion of a charge which contains two or more propositions of law is insufficient, if any one of them is sound, because such an exception does not inform the judge which proposition is challenged and give him an opportunity to correct it. St. Louis, I. M. & S. R. Co. v. Spencer, 18 C. C. A. 114, 116, 71 Fed. 93, 95; New Dunderberg Min. Co. v. Old, 38 C. C. A. 89, 94, 97 Fed. 150, 155; Price v. Pankhurst, 3 C. C. A. 551, 53 Fed. 312. For this reason the second ground of objection is untenable and is here dismissed.

The gist of the shipper's offense under paragraph 3 of section 10, as amended by the act of 1889 (25 Stat. 858, c. 382 [U. S. Comp. St. 1901, p. 3160]), is the fraud of obtaining transportation at a rate less than the established rate "by false billing, false classification, false weighing, false representation of the contents of the package or false report of weight or by any other device." Under the familiar maxim, "noscitur a sociis," the device of this paragraph is a device of the same character as the false representations with which it is associated, a deceptive or fraudulent device. Davis v. U. S., 43 C. C. A. 448, 451, 104 Fed. 136, 139. Obtaining transportation at a rate less than the regular published rate, without committing any fraud or making any false representation to secure it, is not unlawful under this act of 1889. And an averment of the fraudulent device by which the transportation is secured is indispensable to an indictment founded upon that act, because the fraudulent device is the substance of the offense. U. S. v. Hanley (D. C.) 71 Fed. 672, 676.

But it is not so with the offense of the shipper denounced by the Elkins act upon which this indictment is based. That act did not repeal, modify, or amend the provision of the act of 1889, which made the obtaining of transportation at a less rate by a fraudulent device a crime. But it created a new offense, the acceptance or receipt of a concession whereby any property in interstate or foreign commerce should be transported by any device whatever at less than the regular filed and published rate. The substance of this offense is not the device, but the solicitation or receipt of the concession and the transportation thereby effected. It may be committed whether the concession is induced by a fraudulent or an honest device, by a shrewd or a simple one, by a secret or an open one. The true meaning of the phrase "by any device whatever" here is directly or indirectly, in any way whatever, and the evident purpose of its use was to emphasize the scope of the law so that it would clearly include the solicitation or receipt of every concession, however obtained, whereby property in interstate or foreign commerce should be transported at less than the regular filed and published rate.

It is conceded that, where a crime is a statutory one, the indictment must set forth with clearness and certainty every essential element of which it is composed. It must portray the facts which the pleader claims constitute the alleged transgression so distinctly as to advise

Digitized by Google

the accused of the charge which he has to meet and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or an acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction. Ledbetter v. U. S., 170 U. S. 606, 609, 610, 18 Sup. Ct. 774, 42 L. Ed. 1162; U. S. v. Britton, 107 U. S. 655, 669, 670, 2 Sup. Ct. 512, 27 L. Ed. 520; U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135; U. S. v. Hess, 124 U. S. 483, 488, 8 Sup. Ct. 571, 31 L. Ed. 516; U. S. v. Cook, 17 Wall. 168, 174, 21 L. Ed. 538; U. S. v. Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588; U. S. v. Simmons, 96 U. S. 360, 24 L. Ed. 819; Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Miller v. U. S., 66 C. C. A. 399, 403, 133 Fed. 337, 341. The indictment in this case pleads the names of the carriers that transported the property, the date and place of the delivery of the goods to the initial carrier and of the receipt of the concession by the shipper, a description of the specific articles shipped, the filed and published rate, the less rate at which the goods were transported, and the amount of the concession, the place of shipment, and the point of destination of the property, and the route over which it was transported. Here were averments of facts sufficient to clearly advise the defendant of the offense with which it was charged, to give it ample opportunity to prepare its defense, to enable it to avail itself of a conviction or an acquittal in the case of another prosecution for the same crime, and to qualify the court to determine whether the facts stated constituted an offense. The particular device by which the concession and transportation were obtained was not an essential ingredient of the offense charged, because the latter might well exist, whatever the device, and whether or not there was one, and hence the indictment portrayed every material element of the crime without an averment of this device. U. S. v. Tozer, 37 Fed. 635, 637.[2] The substance of the crime of receiving a rebate or concession under the Elkins act is the solicitation, acceptance, or receipt thereof, whereby property in interstate or foreign commerce is transported at less than the regular rate. The device whereby the receipt and transportation are obtained is not an essential element of the crime, and it is unnecessary to plead it in the indictment.

4. On June 17, 1905, when the part of the filed and published rate on the article shipped proportionate to the carriage from the Mississippi river to New York was 23 cents per 100 pounds, the Burlington company agreed with the packing company to carry goods of this character for it until December 31, 1905, at this rate. But the shipment here challenged was made under this contract, and the concession of 12 cents per 100 pounds from the then established rate was received on August 17, 1905, 11 days after the Burlington company and its connecting carriers by an amendment to their tariffs and schedules filed and published, as required by law, had raised the part of the established rate proportionate to the transportation from the Mississippi river to New York to 35 cents per 100 pounds. Did the contract extract the

[2] 2 L. R. A. 444.

Digitized by Google

vice of illegality from the receipt of the concession and the transportation thereunder?

The amended act to regulate commerce requires carriers subject to its terms to cause tariffs and schedules of their rates to be filed and published, prohibits them from raising the rates thus established on less than ten, and from lowering them on less than three, days' notice, and the Elkins act declares that it shall be unlawful for any person or corporation to give or receive any rebate or concession, whereby any property in interstate or foreign commerce shall be transported at a less rate than that named in the tariffs thus filed and published. If the contract here presented legalizes the receipt of the concession obtained under it, then the courts must add to this provision of the Elkins act the clause, "except where the concession is given or received under a prior contract to transport the property at a less rate which was in force when the agreement was made," or a term of similar import. But the Congress made no such exception. Why should the courts do so? Madden v. Lancaster Co., 12 C. C. A. 566, 573, 65 Fed. 188, 195; Omaha Water Co. v. City of Omaha, 77 C. C. A. 267, 147 Fed. 1, 13.

The validity of the contract is exhaustively discussed; but that is not the test of the legality of the concession. It may be unlawful to perform a valid contract. A man and a woman may make a legal agreement to marry; but, if either marries another, the subsequent performance of the former contract is illegal.

Counsel invoke the conceded rule that carriers engaged in interstate and foreign commerce are free to make contracts relative to the rates and the traffic therein which are not prohibited by the acts to regulate this commerce. Cincinnati, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 197, 16 Sup. Ct. 700, 40 L. Ed. 935; Interstate Commerce Commission v. Baltimore & Ohio R. Co. (C. C.) 43 Fed. 37; Interstate Com. Commission v. Chicago G. W. Ry. Co. (C. C.) 141 Fed. 1003; Laurel Cotton Mills v. Gulf, etc., R. Co., 37 South. 134, 84 Miss. 339, 66 L. R. A. 453; Southern Pac. Co. v. Interstate Com. Com., 200 U. S. 536, 554, 26 Sup. Ct. 330, 50 L. Ed. 585. But this principle and these authorities leave the question whether or not this contract was prohibited undecided.

The decisions in the early cases of Pond-Decker Lumber Co. v. Spencer, 30 C. C. A. 430, 86 Fed. 846, and Mobile & Ohio R. Co. v. Dismukes, 10 South. 289, 94 Ala. 131, 17 L. R. A. 113, to the effect that contracts for transportation at less than the established rates are valid and enforceable, have been called to our attention. But the rule that agreements by carriers, subject to the national acts to regulate commerce to transport property in interstate or foreign commerce for less than the legal filed and published rates are unlawful and void, has since been so conclusively established that it is no longer open to doubt or discussion. Gulf, etc., R. Co. v. Hefley, 158 U. S. 98, 105, 15 Sup. Ct. 802, 39 L. Ed. 910; Southern Ry. Co. v. Harrison, 24 South. 552, 554, 119 Ala. 539, 43 L. R. A. 385, 72 Am. St. Rep. 936; Texas & Pac. R. Co. v. Mugg, 202 U. S. 242, 245, 26 Sup. Ct. 628, 50 L. Ed. 1011. It is true that in the cases last cited the contracts were made after the higher rates had been filed and published; but the El-

Digitized by Google

kins act declares the receipt of the concession from the rate filed and published after the execution of such a contract to be illegal in the same terms as it does that from a rate filed and published before the contract is made, since it declares the receipt of every concession from the filed and published rate illegal.

Counsel concede that the carrier and shipper can make no contract that would not be subject to a change in the rate by Congress or by the finding of the Interstate Commerce Commission; but they contend that this agreement was valid at its execution, because it stipulated for the maintenance of the rate then established, that the right of the carrier to raise that rate on 10 days' notice was a privilege which it might waive, that by its agreement to maintain the established rate until December 31, 1905, it waived this privilege until that time, that there is no prohibition in the acts of Congress of a contract to maintain a lawful rate for a reasonable time, that the legal effect of the agreement was to give, not only to the defendant, but to all persons similarly situated, the established rate of June 17, 1905, until December 31st in that year, and that this constituted a lawful contract. If all this were conceded, it would not destroy the baleful effect under the law of the breach of this contract and of the filing and publishing of the higher rate by the carrier. The denunciation as illegal of the giving and of the receiving of a less rate than that so filed and published would still remain. If the legal effect of the agreement was to give all shippers similarly situated the established rate of June 17, 1905, yet that agreement was secret, it was not filed and published, nor was the rate it specified, at the time of the shipment, so that it was not the established rate.

The laws under which the Burlington company is incorporated and the acts of Congress under which it conducts its interstate and foreign commerce constitute a contract between it and the public, whereby the latter have granted to it certain powers which it may not renounce, and imposed upon it certain duties which it may not lawfully disable itself from performing. One of these powers is the authority to establish rates in accordance with the terms of the acts of Congress, and one of these duties is to publicly establish, maintain, and change these rates in compliance with the terms of the acts to regulate this commerce, and the carrier may not lawfully disqualify itself from fully discharging this duty by any contract with a private person or corporation. If such a contract as that in hand were valid, it could not deprive the carrier of its legal right under the acts of Congress to break the agreement and to raise its rates upon 10 days' notice, and the utmost effect of its breach would be to vest in the shipper a cause of action for the damages the latter might sustain.

But the contention that the contract was valid, and that its performance was enforceable after the higher rates were filed and published, ignores a basic rule of the interpretation of agreements and a material part of the contract. That rule is that all laws in existence when an agreement is made necessarily enter into, and form a part of, it as fully as if they were expressly referred to or incorporated into its terms. Van Hoffman v. City of Quincy, 4 Wall. 535, 550, 18 L. Ed. 403; Rees v. City of Watertown, 19 Wall. 107, 121, 22 L.

Digitized by Google

Ed. 72; Edwards v. Kearzey, 96 U. S. 595, 601, 24 L. Ed. 793; Seibert v. Lewis, 122 U. S. 284, 295, 7 Sup. Ct. 1190, 30 L. Ed. 1161; Southern Ry. Co. v. Bouknight, 70 Fed. 442, 446, 17 C. C. A. 181, 185, 30 L. R. A. 823. And the portion of the agreement ignored is the provision of the amended interstate commerce act (25 Stat. 855, 856 [U. S. Comp. St. 1901, p. 3154]) that carriers subject to it shall file and publish their rates, and that no advance shall be made in them except by filing and publishing the new rates after 10 days' notice, and the provision of the Elkins act, which declares the receipt of every concession from the filed and published rates illegal. When these provisions are read into this agreement, as they must be under the law, its true interpretation is not that the carrier thereby covenanted to renounce until December 31, 1905, its rate-making power over the articles shipped, vested in it by the public, but that it contracted to maintain the existing rate until December 31, 1905, unless that rate was sooner changed in compliance with these provisions of the acts of Congress. This is the rational construction of this contract, because it renders the maintenance of the agreed rate under it enforceable while it was legal, and unenforceable while it was unlawful.

In opposition to these conclusions, counsel invoke the rules that in cases of doubt the interpretation which sustains and enforces a contract should be preferred to that which limits or destroys it, that a construction of a statute which works injustice or great inconvenience should be avoided in favor of a more reasonable interpretation if possible. They portray in vivid colors the great inconvenience, the intolerable restraint upon the freedom of contract, and the inevitable diminution of foreign commerce which will result from a decision that a common carrier may discharge itself from its contract to maintain a rate by changing it in compliance with the national legislation to regulate commerce. But the great purpose of this legislation is to destroy favoritism and to secure equality of rates to all. The authority of Congress, under its power to regulate commerce, to impose the necessary restriction upon the freedom of contract to accomplish this object, is no longer doubtful. It is to this end that carriers are required to file and publish their rates, that they are forbidden to change them except by filing and publishing the new rates after public notice, and that rebates, concessions, preferences, and discriminations are forbidden. If a carrier may lawfully make an enforceable contract with a shipper to maintain an established rate upon future shipments for a definite time, it may make such an agreement with a preferred patron, then file and publish an advanced rate, which will govern like transportation by others similarly situated, and the performance of its contract will give the concession and work the discrimination which the national acts to regulate commerce were enacted to prevent. All carriers may make similar agreements with their shippers and take like proceedings, and the national legislation against rebates, concessions, and discrimination will be futile. The acts of Congress may not be thus evaded. A contract between a carrier and a shipper engaged in interstate or foreign commerce to maintain a filed and published rate for a definite time excepts from

Digitized by Google

its term by virtue of the national acts to regulate commerce the time during which a different rate is filed and published under the laws. Such a contract constitutes no defense to a charge of giving or receiving a rebate or concession from the filed and published rate. The giving and the receiving of every rebate or concession, whereby property in interstate or foreign commerce is transported at a less rate than that legally filed and published, whether this rebate or concession was obtained under a previous contract or not, is illegal under the Elkins act. Congress made no exception, and it is not the province of the courts to do so.

These conclusions are the logical result of, and are sustained by, the opinion of the Supreme Court in New Haven & Hartford R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 398, 26 Sup. Ct. 272, 50 L. Ed. 515. In the course of the litigation in that case, it became necessary for the Supreme Court to consider and determine the validity of a contract made in 1896 between the Chesapeake & Ohio Company and the New Haven Company, whereby the former agreed to sell and deliver coal, which it bought in West Virginia, at New Haven, in Connecticut, at a fixed price per ton. The Chesapeake & Ohio Company transported the coal from the mines in West Virginia to Newport News and hired its carriage from that place to New Haven. The Interstate Commerce Commission claimed that this contract was illegal, because, when the purchase price of the coal in West Virginia and the cost of transportation from Newport News to New Haven were deducted from the selling price, the amount remaining was less than the filed and published rate from the mines in West Virginia to Newport News. The Chesapeake & Ohio Company answered, among other things, that, when the contract was made, the purchase price of the coal and the cost of the transportation from Newport News to New Haven were so low that their deduction from the selling price left an amount equal to the established rate from the mines in West Virginia to Newport News, and that if subsequently the cost of the coal and of the transportation from Newport News to New Haven increased, so that the compensation of the Chesapeake & Ohio Company for its part of the carriage was less than the established rate, the contract was valid in its inception and continued to be so. Of this contention the court said:

"Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the Chesapeake & Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating for the payment of a fixed price in the future, and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so."

Digitized by Google

5. Finally, the judgment of conviction is assailed on the grounds that the facts stipulated do not support the charge, and that they disclose no evidence of any criminal intent on the part of the shipper. The charge was that, upon a through shipment from Kansas City to New York for export, the packing company received a concession of 12 cents per 100 pounds from the established rate of 35 cents per 100 pounds for that part of the route between the Mississippi river and New York. The agreed facts were that the tariffs filed and published prior to August 6, 1905, showed the rate for the carriage from the Mississippi river to New York upon products of the character shipped to be 23 cents per 100 pounds; that on June 17, 1905, the carrier contracted with the shipper to transport these products until December 31, 1905, at a rate the proportional part of which from the Mississippi river to New York was in fact 23 cents per 100 pounds; that on August 6, 1905, the Burlington company and its connecting carriers filed and caused to be published an amendment of their schedules and tariffs, which established a new rate the proportionate part of which for the carriage from the Mississippi river to New York was 35 cents per 100 pounds; that on June 16, 1905, the shipper contracted with the proprietors of the Wilson line for the transportation of property of this character from New York to Christiania, Norway, at the rate of 19.93 cents per 100 pounds; that on August 17, 1905, the packing company delivered the shipment to the Burlington company for transportation from Kansas City to Christiania, Norway, under a through bill of lading at the rate of 52.93 cents per 100 pounds, of which 19.93 cents was the agreed ocean rate; that "the full rate for the through carriage was in fact made up so that the proportionate part of the rate for the carriage from the Mississippi river to New York was 23 cents per 100 pounds. The packing company did not at any time know how the rate was apportioned or made up or divided among the respective carriers or points, except that it knew the steamship rate." But "it knew of the filed, published, and posted rate on the character of property embraced in the shipment established by the amendment" of August 6, 1905, and "shipments were made and carried according to the terms of said contract before August 6, 1905, and the provisions and products named in the indictment herein as shipped and carried were carried under said contract; the defendant company, shipper, contending and insisting that said amendment increasing the tariff rate did not and could not impair the terms of the contract." Counsel for the packing company insist that the last clause quoted means that the shipper was contending and insisting at the time of the trial, while the district attorney asserts that it refers to the time when the provisions and products were shipped and carried. The latter construction must prevail, because the paragraph in which this clause occurs relates to the time of the shipment, and not to the time of the trial.

The alleged defect in this proof is that the indictment charged a concession from a rate of 35 cents per 100 pounds shown on the filed and published schedules for the carriage from the Mississippi river to New York, while the agreed facts are that this rate of 35

Digitized by Google

cents did not appear on the filed and published tariffs and schedules, but it was the part of the rate from Kansas City to New York there published proportionate to the transportation from the Mississippi river to New York. But this was an immaterial variance, because the stipulated facts also show that this 35 cents was in fact the part of the published rate from Kansas City to New York proportionate to the carriage from the Mississippi river to New York: that the packing company knew this published rate, which must have been much more than 35 cents, the part of it proportionate to the carriage east of the river; that it also knew that it was paying 52.93 cents less the ocean rate, 19.93 cents, or only 33 cents, for the entire transportation from Kansas City to New York, a rate which was in fact 2 cents less than the rate proportionate to the carriage east of the river. It must therefore have known that it was receiving a concession from the published rate from Kansas City to New York, and hence a proportionate concession from every part of it, in the absence of proof that the entire concession was accepted from some specific part.

And here also is the evidence of criminal intent, the evidence that the shipper knew it was receiving, and that it intended to secure, a concession whereby its property was transported in foreign commerce at a less rate than that legally filed and published. "Contending and insisting that said amendment increasing the tariff rate did not, and could not, abrogate or impair the terms of said contract," the defendant knew it was receiving, and it intended to secure, a concession from the filed and published rate, knew that it was committing an act which the Elkins act declared to be illegal, and this is the only criminal intent requisite to convict of a statutory offense that is not wrong in itself. A corrupt purpose, a wicked intent to do evil, is indispensable to a conviction of a crime which is morally wrong. But no evil intent is essential to an offense which is a mere malum prohibitum. A simple purpose to do the act forbidden, in violation of the statute, is the only criminal intent requisite to a conviction of a statutory offense, which is not malum in se. Bishop on Statutory Crimes, § 596b; 1 Bishop's Crim. Law (8th Ed.) §§ 343, 345, par. 4.

No question of liability on account of a concession given or received under a mistake of fact or in ignorance of the established rate is presented in this case, because the defendant knew the filed and published rate, and that it was receiving a concession from it. The only mistake it pleads or proves was an error of law, its unfounded belief that by means of a contract with the carrier it could annul or evade the plain declaration of the statute that the concession it received was illegal, and such an error of law excuses no one. Wharton's Crim. Law (9th Ed.) § 84; U. S. v. Anthony, 24 Fed. Cas. 829, 831, 832, No. 14,459; State v. Zichfield, 46 Pac. 802, 805, 806, 23 Nev. 304, 34 L. R. A. 784, 62 Am. St. Rep. 800; State v. Hughes, 58 Iowa, 165, 169, 11 N. W. 706; Hoover v. State, 59 Ala. 57; Reynolds v. U. S., 98 U. S. 145, 167, 25 L. Ed. 244. The agreed facts were sufficient to sustain the judgment, and there was substantial evidence of the criminal intent of the shipper.

Digitized by Google

Counsel for the shipper have insisted, and the district attorney has denied, that any criminal intent was essential to a conviction of the statutory offense here charged. It has not been necessary to consider or decide, and the court has not considered, and does not decide, that question, because there was ample evidence that the shipper was guilty of the only criminal intent that could be requisite to such a conviction. The case has been determined on the assumption and concession, but not upon a decision that such an intent was indispensable.

A deliberate and patient consideration of the many and grave questions which have been presented in these cases has led to the conclusion that there was no error in their trial, and the judgments below must be affirmed.

(153 Fed. 24.)

JOHN D. PARK & SONS CO. v. HARTMAN.

(Circuit Court of Appeals, Sixth Circuit. March 14, 1907.)

No. 1,581.

1. MONOPOLIES—CONTRACTS IN RESTRAINT OF TRADE—SALE OF ARTICLE MADE BY SECRET PROCESS.

The exemption from the common-law rule against monopoly and restraint of trade, and the provisions of the federal anti-trust act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), which has been extended to contracts affecting the sale and resale, the use or the price of articles made under a patent, or productions covered by a copyright, does not extend also to articles made under a secret process or medicine compounded under a private formula.

2. SAME—PROPERTY RIGHTS—SECRET PROCESS OR FORMULA.

While the owner of a patent or copyright is protected in his exclusive right by the statute which gives him a monopoly, there is no statute which protects one who makes or vends an article which is made by a secret process or private formula, nor, so long as he keeps his process secret, can he bring himself within the principle of the statute which grants a temporary monopoly in consideration of the full publication of the invention or work.

3. CONTRACTS IN RESTRAINT OF TRADE—SALE OF ARTICLES MADE BY SECRET PROCESS.

The owner of a secret process or formula is not protected by law in his secret, but he may protect himself by contract against its disclosure by one to whom it is communicated in confidence, or restrict its use by such person, and such contracts are not in restraint of trade because of the character of the property right in the secret which would be destroyed by its disclosure, and because it is not in itself an article of commerce, but such considerations do not apply to contracts for the sale of the manufactured product which do not involve a disclosure of the secret, and such contracts are within the rules against restraint of trade.

4. SAME.

The fact that an article of commerce is sold under a trade-name or in a trade dress affords it no exemption from the common-law or statutory rules against restraint of trade.

5. SAME.

The sole manufacturer of a medicine made in accordance with a secret formula, but unpatented, sold the same only under a system of contracts between himself and wholesale dealers to whom alone he sold at uniform prices, by which they bound themselves to sell at a certain price

Digitized by Google

and only to retail dealers designated by him, and between him and such retail dealers, by which in consideration of being so designated they bound themselves to sell to consumers only and at a certain price. Such contracts had been entered into as the manufacturer alleged by a large majority of the wholesale and retail druggists in the United States. *Held*, that such system of contracts was prima facie illegal both at common law as in unreasonable restraint of trade and under the federal anti-trust act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), where it affected interstate sales; its purpose and effect being to prevent competition between purchasers of the medicine both wholesale and retail, and that, in the absence of allegation of facts showing it to be necessary for the protection of the manufacturer's business, a court of equity would not aid in the enforcement of the contracts by granting an injunction to prevent a defendant, who was not a party thereto, from buying the medicine from purchasers who were, and reselling the same at any price it might see fit.

[Ed. Note.—Rights and liabilities of parties contracting with trusts or combinations in restraint of trade, see note to Chicago Wall Paper Mills v. General Paper Co., 78 C. C. A. 612.]

6. SAME—SINGLE CONTRACT.

A single contract, although it be such as, taken alone, may not be within the rule at common law against contracts in restraint of trade, which is one of a great number of identical contracts made between the producer of an unpatented article of commerce and dealers therein, forming a "system" of contracts, which, taken as a whole, materially affects the public interests by stifling competition and trade in said article, is an unreasonable restraint, and within the rule at common law against contracts in restraint of trade, if, from an examination of the workings of the whole system, it appears that the restraint is actually, though not ostensibly, the main result and object of the system of contracts, and not merely ancillary or incidental to another and legitimate object.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

For opinion below, see 145 Fed. 358.

The plaintiff below is a manufacturer of certain proprietary medicines, the chief of which is the well-known article called "Peruna." This, together with other preparations, he puts on the market through a system of contracts intended to maintain prices. Thus it is averred that he sells only to jobbers or wholesalers at uniform prices with a discount varying according to quantity. Each such jobber is required to sign a written agreement to sell only to retailers whose names shall be furnished by complainant, and who shall have signed a retailer's agreement with him obligating them to sell only to consumers at a price named by the complainant or found on his labels and wrappers. To enable him to discover violations of the agreement to sell only for consumption and only to consumers, each such retailer is required to stamp or write his name on each bottle or package sold, and, to insure against sales by wholesalers to unlicensed retailers, each sale must be reported to the complainant. The averment is that there has grown up a very large demand for "Peruna," and that such contracts have been made with jobbers and wholesalers all over the United States, and that "a majority of the retail druggists of the country have executed such contracts."

The defendant is a corporation organized under the laws of Kentucky, and is engaged in the jobbing or wholesale drug and proprietary medicine business. It is charged that the defendant company, with full knowledge of complainant's method of contracting the sales of "Peruna," has refused to enter into any contract with the complainant, and is not therefore entitled "to buy or deal in your orator's medicines and remedies." It is then averred that defendant company, in combination with other wholesalers and retailers, who have refused to sign complainant's contracts, has "unlawfully and fraudulently obtained and procured your orator's remedies and medicines, including 'Peruna,' from your orator's wholesale and retail agents, both directly and in-

Digitized by Google

directly, by means of false and fraudulent representations and by surreptitious and dishonest methods, and by persuading, directly or indirectly, your orator's wholesale and retail agents, under contract with your orator as aforesaid, to violate and break said contracts and sell and supply your orator's remedies and medicines, including 'Peruna,' to said defendant, and, after having procured" same, has advertised and sold same to dealers at less than the established price and less than the jobbing prices. It is also averred that, for the purpose of rendering it difficult to trace such purchases, the defendant, obliterates the serial number placed in such carton, and defaces and takes off the distinctive wrappers, etc., and in that condition sells the same. All of which conduct is averred to have resulted in "irreparable injury and damage" to complainant's system of trade, and that defendant gives out that it will continue its said conduct. The prayer of the bill is that the defendant be enjoined "from in any manner inducing or persuading, or attempting to procure, induce or persuade, directly or indirectly" any breach of any such sales agreement as stated, "and from procuring or attempting to procure in any way your orator's remedies and medicines, directly or indirectly, from any wholesaler or retailer who has executed such wholesale or retail agency contract with your orator in violation of same," and "from advertising, selling, or offering for sale the remedies and medicines of your orator obtained in or by any of the means aforesaid at prices less than the established retail price thereof, or to wholesale or retail dealers who have not entered into wholesale or retail contracts with your orator," and from mutilating or removing the cartons, wrappers, or labels upon the bottles, etc. The usual prayer for an accounting concludes the bill.

The defendant demurred for want of equity and specially to so much of the bill as sought to enjoin the defendant from mutilating labels, cartons, or wrappers, etc. The demurrers were overruled, and an injunction awarded pendente lite in the very terms of the bill.

From this interlocutory injunction this appeal has been perfected.

Alton B. Parker, for appellant.

Frank F. Reed, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The system of contracts by means of which the complainant proposes to retain control of all sales and resales of its goods is not unique. It was first applied to commodities made under patents or productions covered by copyright. According to one of the averments of the bill, the same system of contracts has been generally adopted by the wholesale and retail druggists of the United States. But this, we take it, means no more than it has been adopted as a plan for maintaining prices and controlling sales of proprietary medicines, a business which amounts to more than $60,000,000 annually. That the same plan has been extended to sales in respect to other commodities, not coming under the peculiar claims advanced for "patent" medicines, we may take notice. The question, in its shortest form, is whether the exemption from common-law rules against monopoly and restraints of trade, and the provisions of the federal anti-trust act, which has been extended to contracts affecting the sale and resale, the use or the price of articles made under a patent or productions covered by a copyright, extend also to articles made under a secret process or medicine compounded under a private formula. The fundamental position of counsel for the complainant is that in principle there is no distinction between the monopoly secured to a patent or copyright and the monopoly of a trade secret, and they advance and defend the claim that articles made

Digitized by Google

under patents, copyrights, and trade secrets may lawfully be contracted for and sold under any conditions and limitations with respect to price and subsales which the vendor chooses to impose, and that "contracts relating to any such articles are not within the restraint of trade rules." If this contention is sound, the contracts under which the complainant conducts his business are legal, and no question remains but a consideration of the matter of the relief equity may give against one not a party to such contracts under the facts of this case.

That articles made under patents may be the subject of contracts by which their use and price in subsales may be controlled by the patentee, and that such contracts, if otherwise valid, are not within the terms of the act of Congress against restraints of interstate commerce or the rules of the common law against monopolies and restraints of trade, is now well settled. Heaton-Peninsular Button Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Dickerson v. Tinling, 84 Fed. 192, 28 C. C. A. 139; Edison Phonograph Co. v. Kaufmann (C. C.) 105 Fed. 960; Edison Phonograph Co. v. Pike (C. C.) 116 Fed. 863; Rupp et al. v. Elliott, 131 Fed. 730, 65 C. C. A. 544; Victor Talking Machine Co. v. The Fair, 123 Fed. 428, 61 C. C. A. 58; Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. The patent grants an exclusive right to use, to make, and to sell. The patentee may grant, if he will, an unrestricted right to make and sell or use the device embodying his invention, or may grant only a restricted right in either the field of making, using, or selling. To the extent that he restricts either one of these separable rights, the article is not released from the domain of the patent, and any one who violates the restrictions imposed by the patentee, with notice, is an infringer. This is the ground upon which the cases stand which uphold restrictions upon either use or sale of a patented article where infringement is alleged. But, when a patentee imposes such restrictions, they may likewise constitute a contract between the patentee and his direct vendee or licensee. In such case the patentee would have a double remedy—an action in tort for infringement, or an action for the breach of the contract. The double remedy in such circumstances is noticed in Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, and in Victor Talking Machine Co. v. The Fair, 123 Fed. 424, 61 C. C. A. 58. In Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, the action was one for breach of a contract by which the patentee had suffered his invention to be used on condition that the articles embodying it should not be sold below a certain price. In National Phonograph Co. v. Schlegel, 128 Fed. 733, 64 C. C. A. 594, the bill was not to restrain infringement, but to enjoin sales by a vendee who was a jobber and who by direct contract had purchased phonographs made under the patent, agreeing to sell only at a named price and only to retailers who signed an agreement regulating retail sales. Whether a remedy is sought for the violation of restrictions placed by a patentee, upon either the use or the sale of an article made under the patent, is in tort or in contract, the rules of the common law in respect of monopolies and restraints of trade have no application, because the very object of

Digitized by Google

the patent law is to give to the patentee an exclusive monopoly in using, making, and selling the device which embodies the invention, and this exclusive right he may exercise by contracts under which he reserves to himself so much of his exclusive right as he does not elect to sell or assign or license. It follows therefore that contracts restraining subsequent sales or use of a patented article which would contravene the common-law rules against monopolies and restraints of trade, if made in respect of unpatented articles, are valid because of the monopoly granted by the patent. Bement v. National Harrow Co., 186 U. S. 70, 91, 93, 22 Sup. Ct. 747, 46 L. Ed. 1058; Edison Phonograph Co. v. Kaufmann (C. C.) 105 Fed. 960; Edison Phonograph Co. v. Pike (C. C.) 116 Fed. 863; Victor Talking Machine Co. v. The Fair, 123 Fed. 424, 61 C. C. A. 58. In the Bement Case, cited above, the action was at law to recover liquidated damages for the breach of a contract in respect of the price at which articles made under a patent should be sold. The court, among other things, said:

"The very object of these laws is monopoly, and the rule is, with very few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

In regard to the provision in respect to price the court said:

"The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property in, and providing for its value as far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

It was urged in the same case that the stipulations restricting the price at which sales might be made was in violation of the act of Congress of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), upon the subject of trusts and restraints of interstate trade, but the court held that the act did not apply to contracts in relation to patented articles, saying:

"But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the licensee or assignee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

In National Phonograph Co. v. Schlegel, 128 Fed. 733, 64 C. C. A. 594, the same reasoning was followed and the validity of an agreement restraining prices held to be a valid contract, because it related to a patented article. There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes that the cases which relate to the one subject are not altogether controlling as to the other. See Bobbs-Merrill Co. v.

Digitized by Google

Straus (C. C. A.) 147 Fed. 15, 23.[1] Nevertheless, the statutory right to exclusively publish and vend copies of a copyrighted production would seem to take direct contracts between the publisher and his vendees in respect to the price at which subsequent sales shall be made outside of the rule as to restraints of trade which might otherwise apply. Murphy v. Christian Press Ass'n, 38 App. Div. 426, 56 N. Y. Supp. 597. But one who makes or vends an article which is made by a secret process or private formula cannot appeal to the protection of any statute creating a monopoly in his product. He has no special property in either a trade secret or a private formula. The process or the formula is valuable only so long as he keeps it secret. The public is free to discover it if it can by fair and honest means, and, when discovered, anyone has the right to use it. Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442; Tabor v. Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St Rep. 740; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; Vulcan Detinning Co. v. American Contracting Co., 58 Atl. 290, 67 N. J. Eq. 243. In Chadwick v. Covell, Justice Holmes, speaking of the character of the title one has to a secret formula, said:

"Dr. Spencer had no exclusive right to the use of his formulas. His only right was to prevent anyone from obtaining or using them through a breach of trust or contract. Any one who came honestly to the knowledge of them could use them, without Dr. Spencer's permission and against his will. Peabody v. Norfolk, 98 Mass. 452, 458, 96 Am. Dec. 664; Morison v. Moat, 9 Hare, 241, 263; Williams v. Williams, 3 Meriv. 157. The defendant got his knowledge honestly, and therefore has a right to make and sell the medicines. Having the right to make and sell the medicines, the defendant has the right to signify to the public that the medicines are made according to the formulas used by Dr. Spencer."

In Tabor v. Hoffman, cited above, the New York court said:

"If a valuable medicine, not protected by patent, is put upon the market, any one may, if he can by a chemical analysis and a series of experiments, or by any other use of the medicine itself aided by his own resources only, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts."

But in the case of a patent the monopoly endures for the whole term of the patent. It gives the patentee the right to control the use of his invention during the entire period, and he may rightfully protect by contract his power to regulate all manufacture, sale, or use of things embodying his invention. It is this continuity of the right granted to the patentee which distinguishes it from the right to manufacture, sell, or use unpatented articles. If a man shall make a new invention or make a new discovery and it is useful, he may obtain a patent and thus secure a reward. But even then he must pursue the prescribed course in order to obtain it. He may keep his secret if he can. But, if he puts upon the market things embodying it, he forever loses his right to acquire a monopoly in it; i. e., to obtain a patent, either for manufacture, sale, or use. But it does not follow that because the owner of a secret formula cannot protect himself against discovery of his secret by fair means that he cannot protect himself against a betrayal of his secret by one who has received it through

[1] 77 C. C. A. 607.

Digitized by Google

confidential relations. Jarvis v. Knapp, 121 Fed. 34, 58 C. C. A. 1; Harrison v. Glucose Co., 116 Fed. 304, 311, 53 C. C. A. 484, 58 L. R. A. 915; Tabor v. Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740; Morison v. Moat, 9 Hare, 241; Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442. So also will the owner of a secret process or formula be protected against a breach of contract, when the secret is communicated in confidence and under restrictions as to its use. Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67.

In Fowle v. Park, the owner of the formula sold the right to make the remedy and sell it under its trade-name at a restricted price within a given territory. The court enjoined the breach of this agreement. The conclusion of the learned Chief Justice who wrote the opinion of the court seems to rest, not upon any notion that contracts touching the sale of a secret formula or trade secret were outside the rules of the common law in regard to restraints of trade, but rather upon the theory that such contracts were governed by the principle against restraints, but valid because the covenants were made in connection with the sale of a business and not larger than necessary to protect the reserved rights of the assignor to carry on the same business. In Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24, 53, 11 Sup. Ct. 478, 35 L. Ed. 55, Justice Gray seems to have rested the legality of such covenants upon the peculiar nature of the property which is the subject of the sale, saying:

> "Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is sold."

The most satisfactory ground upon which covenants restraining the use to be made of a trade secret may be said to not contravene the common-law rules against monopoly and restraints lies in the peculiar character of the property right which is concerned. So long as the owner of such a secret can preserve its secrecy he has necessarily a monopoly in its use, and there is no illegal restraint because he refuses to make it public. Neither is the public interest affected whether the process or formula is used by A. or B. or by both, for there can be no restraint of trade in respect of a method or formula which is known only to the discoverer and those to whom he chooses to communicate it under restrictions. Having no right to compel a publication, the public lose no right by respecting a restricted disclosure, for no freedom of traffic has been stifled. The language of Justice Holmes in Board of Trade v. Christie, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, in respect of contracts limiting the right of those who receive the market quotations to a special use, is equally applicable to trade secrets in general. The learned justice said:

> "But, so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly and no contract in restraint of trade, either under the statutes or at common law."

In Ammunition Co. v. Nordenfeldt, L. R. 1 Ch. Div. 630, 1894, Lord Justice Bowen said that the sale of a trade secret was not with-

Digitized by Google

in the mischief of restraint of trade, because, "unless such a bargain was treated as outside the doctrine of general restraint of trade, there could be no sale of secret processes of manufacture."

The basis of the common-law protection accorded to an author is the same. His legal rights grow out of the peculiar nature of the property. His composition is properly regarded as his absolute property. He need not disclose it. But the unrestricted offer of a single copy to the public operates as a disclosure or publication, and his exclusive right to make other copies is gone. But he may in confidence exhibit his work under restrictions, and this, like the confidential disclosure of a trade secret, will not amount to a dedication to the public, and he will be protected against a violation of the conditions imposed. The whole subject of the common-law rights of an author is so fully and carefully discussed by Judge Townsend in Werckmeister v. American Lithographic Co., 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591, and in Bobbs-Merrill Co. v. Straus (C. C. A.) 147 Fed. 15,[2] that it would be a work of supererogation to again go over the subject. The cases relating to the distribution of news and information rest also upon the peculiar kind of property rights involved. So long as one who by his own industry has gathered together news or information, and does not disclose it, he cannot be compelled to make publication. The matter is his own in as true a sense as a trade secret or private formula, or the composition of an author. In such circumstances it is not illegal to protect the news gatherer against the piratical use of his news and prevent a public disclosure by one who has placed himself under obligation to respect a restricted use. In such case public disclosure is destructive of its value as property. Board of Trade v. Christie, 186 U. S. 236, 250, 25 Sup. Ct. 637, 49 L. Ed. 1031; Jewelers' Mercantile Agy. v. Jewelers' Pub. Co., 84 Hun, 12, 32 N. Y. Supp. 41; Id., 155 N. Y. 251, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666; National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294, 56 C. C. A. 198; Exchange Tel. Co. v. Gregory, etc., Co., 1 Q. B. Div. 147 (1896); F. W. Dodge, etc., Co. v. Construction Co., 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412. In the Board of Trade Case, cited above, Justice Holmes, speaking of the protection granted to the business of distributing stock quotations, said:

> "In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing it, to itself. * * * The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public."

The trading stamp and railroad ticket cases, such as Sperry & Hutchinson Co. v. Mechanics' Clothing Co. (C. C.) 135 Fed. 833, and Nashville, etc., Ry. Co. v. McConnell (C. C.) 82 Fed. 65, likewise rest upon the peculiar character of the property rights involved. Neither concern the buying and selling of articles of general commerce, and both relate to things in the nature of contracts personal in character, and not to things which can ever become the subject of general trade and traffic. But it does not follow that because a secret process

[2] 77 C. C. A. 607.

Digitized by Google

or formula for a medicine or beverage will be protected against betrayal by employés or those to whom it has been communicated in confidence under a contract for a restricted use that a system of contracts for the control of all sales and subsales of the device, medicine, or beverage when once made will be outside of the rules in restraint of trade simply because the product of such secret process or formula. We have here to deal not with contracts which relate to the secret formula itself, or the right to use a trade-name or dress, as in Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67, but with the preparation when made by the owners of the process. The preparation when ready for the market and the formula are two separate and distinct things and may have distinct ownerships. Contracts in respect of a restricted use of the formula are not within the rule against restraint because of the character of the property right in such a secret. There can be no unrestricted use, before discovery by fair means, to which the owner does not consent, and then only at the expense of the destruction of its commercial value as a secret; but this is not the case with contracts which affect only traffic in the manufactured product of the secret formula. Freedom of traffic in that is consistent with its value and does not involve exposure of the formula.

Neither is there any such analogy between an article made under a patent and an article made under a secret formula as to require like exemptions from the rules which relate to articles made under neither. It is well at this point to notice that the exemption from the rule against restraint has never been extended to contracts in respect of articles made under a patent which have once passed beyond the domain of the patent by an original sale without restriction. The only reason which has ever been given for holding that a contract restricting the field of using, selling, or making of an article made under a patent is that the patent statute has granted an exclusive monopoly which cannot be cut down by the rule against restraint for that would be to grant a monopoly by law and then proceed to take it away by law.

But, if the owner of a secret process or a private formula does not or cannot bring himself under the protection of the patent statute by securing a patent upon his discovery, he cannot claim the advantage of the statute. The patent law, in consideration of a full and complete publication of the discovery or invention of the patentee, has granted to him a monopoly of his invention, including the making, selling, and using of devices embodying it, for a limited term of years. At the end of that time the disclosure made at the time he applied for his patent will enable the public to enjoy his discovery, and thus find compensation for the exclusive right temporarily conceded to the inventor. No statute grants any such monopoly to anyone who does not elect to avail himself of the benefits of the patent or copyright law. A trade secret or medical formula protects its owner only against those who acquire it under a confidential obligation to guard against disclosure, and, as we have already seen, one is free not only to use the process or formula if discovered by skill and investigation without breach of trust, but to make and sell the thing or preparation as made

Digitized by Google

by the process or formula of the original discoverer, if that be the truth. Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442. To say that the owner of this secret need not make the medicine, nor sell it when made, unless it suits his convenience, is true. But the same thing may be said of the man who grows potatoes. He need not grow them, and need not sell them when grown. But, if something be conceded in favor of an article which no one can produce except the owner of the formula over one which any one can produce, what shall it be? There is no statute creating a lawful monopoly such as seems to take articles made thereunder without the rule against illegal restraint. Neither will the commercial value of the manufactured product vanish if subjected to the principles which apply to things not so made. None of the reasons which apply to patented articles, copyrighted productions, or to restricted disclosure of the secret formula itself apply to the product of the formula.

Without assenting to the claim that the making and selling of the preparation is a "publication" in the technical sense of that term, we are nevertheless unable to discover any legal or economic reason which justly exempts such articles when made from all of the rules of the common law which forbid unreasonable restraints in trade and from the anti-trust act of Congress in so far as trade in the prepared medicine is the subject of interstate commerce. Judge Cochran, who heard this case below, after considering the differences between a secret process and the article made, said:

"What is there, then, in the nature of the articles made under a secret process to occasion any difference between them and articles not so made or between them and articles which one may not have made at all, but simply owns, in the matter of the validity of restraining contracts entered into by the purchasers thereof from the owner? It is hard to conceive of any. It is true that the manufacturer and owner of the articles made under the secret process may refrain from making them and selling them to purchasers and thus putting them on the market. Equally so the manufacturer and owner of any other articles may refrain from so doing. So, also, the owner of articles that he has not made, but purchased or obtained otherwise from the manufacturer, may refrain from selling them to purchasers and thus putting them on the market. Suppose the owner of a patent should sell all the articles made under it to another with license to use or resell them, thus passing them outside of the monopoly of the patent hands of the purchaser, would the mere fact that they had been made under the patent lend any sanctioning force to a restraining contract entered into in reference thereto by a subpurchaser thereof? I must conclude, therefore, that the fact that the complainant's medicine has been made under a secret process has no effect whatever upon the validity of the system of contracts involved herein. He has no greater rights in relation thereto, as distinguished from the secret process under which it was made, than the owner of any other tangible personal property, whether made by him or not, would have in relation to such property."

Although Judge Cochran concluded that the complainant's preparations were no more exempt from the common-law rules against restraints of trade by reason of the fact that they had been prepared under secret formulas than if that had not been the case, he reached the ultimate conclusion that any vendor of an article might make similar contracts to those in suit, and that the control which was thereby secured over subsequent sales was not an unreasonable restraint

Digitized by Google

of trade. Most of the cases which he cites in support of his conclusion are in conflict with the grounds upon which he rests his decision, and, indeed, the learned counsel for the Hartman Company have not assented to so much of Judge Cochran's opinion as holds that a trade secret remedy stands in no better plight than it would if the preparation had been disclosed upon the label. And so it has come about that the cases which have directly involved the Hartman system of contracts, and which are relied upon by counsel to sustain their legality, all stand upon the assumption that an article made under a secret formula may be the subject of contracts maintaining prices and controlling subsequent sales to as full an extent as an article made under a patent or a production secured by a copyright. The cases directly in point are all nisi prius decisions, except Jayne v. Loder, 149 Fed. 21,[8] decided by the Circuit Court of Appeals, Third Circuit, and are all quite recent. They include three cases in which the Dr. Miles Medical Company was the plaintiff, namely, Dr. Miles Medical Company v. Goldthwaite (C. C.) 133 Fed. 794. The force of this case is weakened because the decree was not resisted. The next is Dr. Miles Medical Co. v. Jaynes Drug Co., 149 Fed. 838, decided by the same judge who decided the Goldthwaite Case. The next is Dr. Miles Medical Co. v. Platt (C. C.) 142 Fed. 606. This was followed by Wells & Richardson v. Abraham (C. C.) 146 Fed. 190, in which the legality of the contracts was not denied, thus lessening the value of the opinion as an authority. The ground upon which the two contested cases cited above was rested was the identity between the rights of a patentee and the owner of a mere trade secret or private formula with respect to the product or manufactured article. Thus, in Dr. Miles Medical Co. v. Jaynes, cited above, Judge Colt said:

"The contention of the defendants is that these contracts are unlawful because they are in restraint of trade. In support of this they do not rely so much upon the common-law rule as upon the federal statute (26 Stat. 209). The bill alleges that the complainant is the exclusive owner of these secret formulas, and the exclusive manufacturer of these remedies. It follows that, until voluntary disclosure or lawful discovery, the complainant has an exclusive property in these trade secrets and has the exclusive right to make and use and vend the articles made thereunder. The exclusive right of property in a trade secret is of necessity a monopoly, the same as a patent or a copyright. The complainant may make these articles, or refrain from making them. It may sell them, or refrain from selling them. It may sell them to one person, and not to another, and at such prices and upon such conditions as it may deem most advantageous. Contracts like those set out in the bill concerning articles made under trade secrets, the same as similar contracts concerning articles made under a patent or copyright, are outside the rule of restraint of trade whether at common law or under the federal statute. Hartman v. Park (C. C.) 145 Fed. 358; Dr. Miles Medical Co. v. Platt (C. C.) 142 Fed. 606; Wells & Richardson Co. v. Abraham (C. C.) 146 Fed. 190; Dr. Miles Medical Co. v. Goldthwaite (C. C.) 133 Fed. 794; Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; Board of Trade v. Christie, 198 U. S. 236, 252, 25 Sup. Ct. 637, 49 L. Ed. 1031; Garst v. Harris, 177 Mass. 72, 74, 58 N. E. 174; Fowle v. Park, 131 U. S. 88, 97, 9 Sup. Ct. 658, 33 L. Ed. 67; Park & Sons Co. v. National Wholesale Druggists' Association, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; Standard Fireproofing Company v. St. Louis Company, 177 Mo. 559, 76 S. W. 1008; Victor Company v. The Fair, 123 Fed. 424, 61 C. C. A. 58; Heaton-Peninsula Company v. Eureka Company (C. C.) 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728;

[8] 78 C. C. A. 653, 7 L. R. A. (N. S.) 984.

Digitized by Google

Central Shade Company v. Cushman, 143 Mass. 353, 9 N. E. 629; Good v. Daland, 121 N. Y. 1, 24 N. E. 15."

In Dr. Miles Medical Co. v. Platt (C. C.) 142 Fed. 606, 610, Judge Kohlsaat says:

"These suits are brought for an infringement or violation of the property right of the complainants in the secret process owned or controlled by them. The right of a patentee, owner of a copyright, or owner of a secret process is merely the right of exclusion or debarment. The holder of such a property right, as said by the court in the Victor Talking Machine Case, cited above, is a czar in his own domain. He may sell or not, as he chooses. He may fix such prices as he pleases. He may sell at one price to one person, and another to another person. He is not required to give reasons or deal fairly with purchasers. Why is it material, then, in a suit to prevent infringement of complainants' rights in their secret processes, to inquire whether complainants have entered into a combination or conspiracy to control the very thing they are lawfully entitled to control?"

Jayne v. Loder, cited above, was decided by the Third Circuit Court of Appeals. It was an action under the seventh section of the anti-trust act against a combination of three distinct national associations, one that of the wholesale druggists, another that of the retail druggists, and the Association of Manufacturers of Proprietary Medicines. The object of the combination was to exclude every dealer from trading in proprietary medicines at all who would not consent to sell to members of the combine only and at prices named by it. Arguendo Judge Archbald did say that an individual proprietor might enforce his own terms in respect to his own goods. But this was not involved. The combination was in the teeth of the law whether an individual proprietor could or could not enforce such a system as that there involved.

If we are right in our conclusion that the manufactured product of a trade secret or private formula is not immune from the common-law rules forbidding monopolies and unreasonable restraints in trade, the cases above referred to must be disapproved, at least in so far as they are grounded upon the cases which deal with articles made under patents or copyrights. In addition to the cases cited above, counsel for the appellees cite and rely upon Park v. National Wholesale Druggists' Ass'n, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578. That case involved the validity of a method of doing business and a system of contracts between manufacturers of proprietary medicines and wholesale druggists dealing in such medicines for the purpose of suppressing competition in prices. The opinion does not support the validity of such a system of contracts with reference to medicines not protected by any patent, for the decision is bottomed upon the assumption that the "proprietary medicines," the subject of the contracts then involved, were made under patents. Judge Haight, who delivered the opinion of the court, said:

"The matter in controversy has reference to the sale by manufacturers of those particular medicines or remedies covered by trade-marks, copyrights, or patents which secure to the manufacturer or proprietor the exclusive right to manufacture and sell the same. These medicines are known as 'proprietary goods,' and their manufacture and sale are confessedly under the control and management of the owner or manufacturer, who may fix his own price and adopt such plan for the sale thereof as he, in his judgment, may determine."

Digitized by Google

To the objection that the contracts were in restraint of trade, he said:

"Nor does the plan appear to me to be in restraint of trade. It is true that it does away with the competition among dealers as to prices, but it creates no restriction upon them as to the quantities that they may be able to sell or the territory within which they may confine their transactions; but upon the question of prices we must bear in mind that the goods are covered by patent rights and trade-marks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and, following this, the right also to require dealers to maintain the prices specified."

The principle upon which Park & Sons Co. v. National Wholesale Druggists' Association was decided is emphasized in the subsequent case of Straus v. American Publishers' Assn, 177 N. Y. 473, 477, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819, where was involved the validity of an agreement between publishers of copyrighted books to regulate the price at which retail dealers should sell such books. If the agreement had stopped there, the New York court thought the agreement valid and not in unlawful restraint of trade under the principles announced in Bement v. National Harrow Company, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, an opinion to which we have heretofore referred, which involved contracts for controlling prices of articles made under patents. After referring to the Bement Case Judge Parker, who had written a concurring opinion in the previous case, after setting out the reasoning of Justice Peckham in the Bement Case, said:

"That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the Park & Sons Co. Case, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, upon which defendants apparently rest their claim that the judgment of the Appellate Division should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein, which will now be pointed out."

The dissenting opinion of Judge Martin, in case of Park & Sons Company, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, also proceeds upon the assumption that the subject-matter of the agreement concerned medicines made under patents. See page 42 of 175 N. Y., on page 140, of 67 N. E. (62 L. R. A. 632, 96 Am. St. Rep. 578). The vice which the New York court found in the Straus Case was, not that the agreement obliged publishers not to sell copyrighted books to dealers who would not maintain the retail price dictated by the publishers, but that they also refused to sell uncopyrighted books to all such dealers as did not maintain prices on copyrighted books. This the court found under the facts of the case would operate practically to exclude all persons from the business of selling uncopyrighted books who would not become parties to the agreement to maintain the price of copyrighted books, and tended to create a monopoly of sale of books not copyrighted. Touching this, the court said:

"While the leading object of this association and agreement purports to be to secure to the owner and publisher of copyrighted books that protec-

Digitized by Google

tion which the Federal government permits them to enjoy for the reasons stated by Chief Justice Marshall (supra), it does not stop there. It also affects the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all if he fails to comply with the rules of the association. A combination creating a monopoly of the sale of books not protected by copyright offends against the law of this state as much as if it related to bluestone [Union Bluestone Co. Case, 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655] or envelopes [Berlin & Jones Envelope Co. Case, 166 N. Y. 292, 59 N. E. 906], and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible but probable. But it is not of moment whether such a result is probable or not; for the test to be applied is: What may be done under the agreement? Reference to the complaint makes it clear that the association has undertaken to provide for the practical exclusion from the business of selling books not protected by copyright all who refuse to be bound by the rules of the association."

That decision puts the New York court squarely in opposition to agreements, combinations, and "systems of contracts" between a manufacturer of unpatented or uncopyrighted articles and his vendees which tend to an unreasonable restraint of trade or to create a monopoly, and makes plain the ground upon which such contracts had been maintained in the Park & Sons Co. Case. That the "proprietary medicines," called more than once "patent medicines," were not in fact patented, is of no significance, if true, for the court assumed they were, and it does not appear from anything in any of the opinions that the fact assumed was not true. That opinion, by its own language, as well as by the pointed reference to the principle upon which it rested in the later opinion of the same court, has no application when, as here, the subject of the contracts in question is unpatented and uncopyrighted articles. The cases of Elliman & Sons v. Carrington & Son, L. R. 1901, 2 Ch. Div. 275, and Garst v. Harris, 177 Mass. 72, 58 N. E. 174, are also cited as supporting the legality of such a series of agreements as that under which complainant conducts his business. Both cases involved contracts of sale of article, presumably made under secret formulas, though no stress is laid upon the fact in the Elliman Case. Each was a suit directly between the vendor and his vendee. Each involved only a single transaction by which the article was sold upon an agreement that the purchaser would not resell at less than a named price. Neither concerned any other rights than those of the contracting parties, and neither decides more than that an agreement of sale of a chattel by which the purchaser agrees that he will not sell below a certain price is valid and not such a restraint of trade as to be obnoxious to the law. Neither case holds that a buyer from such a vendee, even with notice, would not get title or come under the obligation of the contract between the original parties. The most that can be made of the decisions is that, having regard to the subject-matter and the limited character of each agreement, neither contract had that sweep and extent which would constitute the restraint an unreasonable one, and therefore not within the mischief of the rule against restraints. The Elliman Case was decided by a single judge.

Walsh v. Dwight (Sup.) 58 N. Y. Supp. 91, another case relied upon to support the decree, was an action by a maker and dealer in saleratus and soda, alleged to be an article in common use, against another maker who sold another brand which he called "Dwight's

Digitized by Google

Cow Brand Saleratus and Soda," for damages to him through a course of business by which his brand of the same article lost much demand. The defendant did this, first, by extensive advertising; second, by giving to all dealers a rebate who would agree to sell its article at a minimum price named and to charge a like price for every other brand. The price thus fixed was, as averred, an extravagant price and operated to enlarge the demand for the defendant's advertised brand and diminish that for the plaintiff's. The court found no illegal restraint of trade, as there was "nothing to prevent others from engaging in the business or the manufacturers of other articles from selling their products to anyone willing to buy." The substance of the decision is well stated in the syllabus as follows:

"An agreement by a manufacturer with his customers to give them a rebate if they should refuse to sell his article, or other similar articles, at less than a certain price, is not in restraint of trade."

The fact that "Peruna" is a trade-name, that it is put on the market in a distinctive trade dress, has no bearing upon the question. The defendants are not charged with infringing the trade-mark or trade dress. The medicine they bought was the medicine put up by the complainant, and the defendants have neither sold nor offered to sell a preparation of their own for and as the preparation of the complainant. A trade-mark, or a trade-name, or trade dress, have no other effect than to prevent one from "palming" off his goods for those of another. Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. The averments of the bill as to the complainant's trade-name and trade dress are irrelevant, for no exemption from the principles of the common law is secured by either. Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. The transactions described in the bill plainly constitute sales of complainant's medicines and the general title passes to every such purchaser and subpurchaser. Garst v. Hall & Lyon Co., 179 Mass. 588, 590, 61 N. E. 219, 55 L. R. A. 631. To call such a purchaser an "agent" is to juggle with words. "Sale" is a word of precise legal import, and every wholesaler who orders goods under one of complainant's uniform contracts becomes a buyer, obtains the title, and may convey the title to another. The case must therefore turn upon the legality of the restrictions imposed by the complainant in sales which pass the general property in chattels, as well as the possession, and provide for no reverter.

Neither is the suit based upon any breach of contract by the defendants. Confessedly, they have made no contract with complainants, and have definitely refused to conform to complainant's methods of doing business. That they have bought "Peruna" on the market from sellers who had it for sale is true. That the bill avers that they bought without being licensed to buy is true. That they bought from vendors who knew this fact and who thereby breached their agreement not to sell to dealers who had not been certified to them as licensed buyers who had entered into an agreement with the complainant restricting resales is also averred. That Park & Sons Company knew

Digitized by Google

complainant's plan of business, and that in selling to them every such vendor thereby breached his agreement, is also charged, and, for the purpose of the demurrer, admitted. What is the result? Did the defendants by so purchasing, with knowledge of the restrictions imposed upon sales, thereby enter into contractual relations with complainant? Manifestly not. Did they obtain the absolute title, notwithstanding their knowledge that the sale was in breach of restrictions imposed upon the seller? Undoubtedly. The restrictions imposed by complainant upon sales and resales, if valid at all, are only so because they constitute personal contracts upon which an action will lie only against the contracting party. Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631. A prime objection to the enforcibility of such a system of restraint upon sales and prices is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery.

The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. "If a man," says Lord Coke, in Coke on Littleton, § 360, "be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man." It is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice. A covenant which may be valid and run with land will not run with or attach itself to a mere chattel. Spencer's Case, 3 Resolution, 5 Coke, 16; Wald's Pollock on Contracts (3d Ed.) 278; Splidt v. Bowles, 10 East, 279, 282; Smith v. Williams, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220; Prater v. Campbell, 110 Ky. 23, 60 S. W. 918; Appollinaris Co. v. Scherer (C. C.) 27 Fed. 18, 21; Garst v. Hall & Lyon Co., 179 Mass. 588, 691, 61 N. E. 219, 55 L. R. A. 631; Taddy Co. v. Sterions Co., 73 Law Journal, 1904, Ch. Div. p. 191; De Mattos v. Gibson, 4 De. J. & Jones, 276, 282. Against this conclusion, and in supposed opposition to the above authorities, counsel for the appellee have cited the line of cases heretofore referred to relating to contracts restraining the use or sale of articles made under patents or copyrights. We have already indicated herein that these cases do not apply to contracts which do not relate to articles not made under patents or copyrights. They also cite New York Bank Note Co. v. Hamilton Bank Note Co., 180 N. Y. 280, 294–295, 73 N. E. 48, De Mattox v. Gibson, 4 De J. & Jones, 276, and Whitwell v. Tobacco Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689. The New York Bank Note Company Case concerned the legality of a contract for the sale of "Kidder

Digitized by Google

Printing Presses" with attachments enabling them to do a certain class of work. There were patents upon certain parts of the press, but none upon the attachments. It was contended that a covenant which restricted the sales of the press with the attachments was void as in restraint of trade. The fourth syllabus is in these words:

"The fact that the contract restricted the sale of presses except to the printing company, and that a separate consideration was paid for the covenant of restriction, does not render the contract so unreasonable in its restraint of trade that it is void for that reason, where the adoption of the press to the special use was the work of both parties and the covenant not to sell other presses for similar work accompanied the manufacture and sale of a press, and constituted an integral part of the thing sold."

The ground is better shown by the following extract from the opinion itself:

"So far as the machine was the subject of patent its use was lawfully a monopoly, and therefore no contract relating to it could be condemned as creating a monopoly. But, whatever may have been the case as to the patentable character of the machine, we think the fact that its adaption to the special use was the joint work of both parties, and that the covenant not to sell other presses for similar work accompanied the manufacture and sale of a machine, rendered that covenant reasonable as constituting an integral part of the value of the thing sold."

See Tode v. Gross, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475. It is manifest that the case is not in point. De Mattox v. Gibson is still less an authority.

Under a bill for specific performance of a charter party the question arose as to whether a mortgagee of the chartered vessel should be allowed to foreclose and thereby intercept a voyage which the vessel was under contract to make when the mortgage was given, of which contract the mortgagee had notice. It was in respect of such facts that Justice Bruce used the language which is supposed to support the notion that a covenant may attach to chattels which pass by delivery from hand to hand and bring any one who buys with notice under the restrictions against a resale at less than a dictated price. But even in that case it was said that the mortgagee who took his mortgage with notice incurred no liability in respect to the charter party, and was only obliged to desist from doing anything which would prevent performance. Whitwell v. Tobacco Co. involved nothing more than whether a tobacco manufacturer might sell his goods at one price to those who would agree to buy only from him and at a higher price to those who would not.

The conclusion we reach upon all the foregoing considerations is that the complainant cannot obtain the active interposition of a court of equity against one who is under no contract relation to him, unless the covenants which he has imposed upon his vendee and subvendees are only such reasonable and partial restraints, for his own protection, as may be legally exacted by one who sells a business or property. This court in United States v. Addyston Pipe Co. et al., 85 Fed. 271, 281, 29 C. C. A. 141, 46 L. R. A. 122 et seq., speaking by Judge Taft, laid down as an indispensable condition that "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and neces-

Digitized by Google

sary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." Covenants in partial restraint, and ancillary to a principal contract, which had generally been upheld, the learned judge divided into five principal classes. The fourth of these classes he defined as covenants "by the buyer of property not to use the same in competition with the business retained by the seller." As typical cases under this class, he cited American Strawboard Co. v. Haldeman Paper Co., 83 Fed. 619, 27 C. C. A. 634, and Hitchcock v. Anthony, 83 Fed. 779, 28 C. C. A. 80, both being decisions by this court. Navigation Co. v. Winsor, 20 Wall. (U. S.) 64, 22 L. Ed. 315; Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816. The court below located the contracts here involved as coming under the fourth class, being covenants ancillary to the sale of the medicines put up by the complainant, which he concluded were not unreasonable for the protection of the retained business of the covenantee. Assuming that these contracts operate only as a partial and not a general restraint, a question which we do not concede, and that they are properly to be considered as covenants ancillary to a principal contract, are the restraints thereby imposed necessary to protect the complainant in his retained business, or to protect him from an unjust use of the articles by the purchaser? In the first place, we are to consider that we are not here dealing with a single contract. The complainant has made a multitude of them in identical terms, and the opposite parties comprehend, according to his bill, a large majority of the wholesale and retail druggists in the United States. The reasons which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate when there are a multitude of identical agreements. The single covenant might in no way affect the public interest, when a large number might. So, also, the question as to whether the restraint was necessary to the retained business, and therefore ancillary to the principal purpose of the agreement, or whether the restraining covenants were not the principal rather than the ancillary matter, would largely depend upon the general sweep and result of a multiplication of identical contracts. The general purpose of each separate contract is the regulation of the prices and sales of the line of preparations made by complainant. A common purpose unites each covenantee to every other and the "system" is to be construed as "one piece," in which the complainant and every assenting dealer, whether wholesaler or retailer, is a party, and the agreement of each such covenantee to sell only at the prices dictated by the manufacturer constitutes one general scheme. The question here is therefore one of a totally different character from that which would arise if the question was the more simple one presented by a breach by a single covenantee. In Continental Wall Paper Co. v. Voight & Sons Co. (C. C. A.) 148 Fed. 939,[4] where was involved a combination in restraint of trade, and, where each wholesaler and retailer in the business had executed separate but identical contracts with the corporation representing the combined manufacturers, we held that each such separate covenantee was a party to the general scheme for enhancing

[4] 78 C. C. A. 567.

Digitized by Google

prices. This was rested upon the holding that the several agreements constituted one whole. See, also, observations of Judge Taft in United States v. Addyston Pipe Co., 85 Fed. 275, 29 C. C. A. 141, 46 L. R. A. 122, and of Justice Peckham in Montague v. Lowry, 193 U. S. 38, 45, 46, 24 Sup. Ct. 307, 48 L. Ed. 608.

The plain effect of the "system of contracts," the purposed relation of each to every other being confessed by the very description of the method of carrying on business stated in the bill, is, first, to destroy all competition between jobbers or wholesale dealers in selling complainant's preparations. Complainant restrains himself by agreeing to sell at only one price and to only such persons as will sign one of his system of contracts. The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to any one who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about. It is true that the complainant is not in a combination with other makers of "Peruna." There are no others. If there were, there would not be a complete or general restraint; for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected. Now, if the complainant had absorbed all the sources from which the demand for lumber, or furniture, or stoves could be supplied and then should say, "I will sell only to those who will resell only to those I shall license to buy and only at the price I dictate," could any voice be raised to say that the covenants, which every dealer should sign in order to prevent exclusion from trade in such articles, would be upheld by the courts and a remedy by injunction granted to restrain breaches? But it is said that a distinction exists between contracts which relate to articles which any one can make and sell and those which are made under a secret process, and that covenants in respect to the former might affect the public interest, while the public would not be affected by like covenants relating to the latter class of subjects. But, unless we are willing to say that that fact places such products wholly outside of the mischief incident to restraints of trade and upon a plane of equality in that respect with that occupied by things made under the statutory monopoly of a patent, the fact can be of no weight except as it may be a factor in determining whether the covenants exacted of jobbers and retailers, alike regulating subsequent sales and selecting subsequent buyers, are no more than necessary to afford a fair protection to the business of

Digitized by Google

the complainant and not so large as to interfere with the interests of the public. There can be no hard and fast rule by which the result can be reached in such cases. At last the question must come to this: "What is a reasonable restraint with reference to a particular case?" This was the test applied in Horner v. Graves, 7 Bing. 735, and in Nordenfeldt v. Maxim Nordenfeldt Co., 1894, App. Cases, 535,567, and also approved by this court in the Addyston Pipe Co. Case, 85 Fed. 271, 282, 29 C. C. A. 141, 46 L. R. A. 122. A general system of contracts, such as that which the complainant seeks to enforce and which the bill avers is a method generally adopted in his line of business, involves very different questions from those which arise when a single contract only is involved and when the action is between the contracting parties for a breach, as was the case in Garst v. Harris, 177 Mass. 72, 58 N. E. 174, and Elliman v. Carrington, L. R. 1901, 2 Ch. Div. 275.

Now, in what way is only a fair protection afforded the interests of complainant by stifling all competition between the jobbers of the United States who deal in complainant's preparations? In what way are the covenants which forbid them to resell to any one who will buy "necessary," to use Judge Taft's phrase, "to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party"? In what way are covenants which compel retailers to maintain prices, to quote Chief Justice Tindal, "such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public"? Horner v. Graves, 7 Bing. 735. The learned trial judge found it difficult to answer these questions. He says in his opinion (145 Fed. 358):

"That complainant's vendees and subvendees should be so restrained is advantageous to complainant's business. It would be an injury to it for them not to be so restrained. Exactly how it is so advantaged and how it would be injured by a removal of the restraint has not been developed in the argument; and I do not feel sufficiently advised of such matters to say as to this. It would seem that the existence of such a system of contracts in relation to complainant's medicine would tend to prevent demoralization in the trade therein through competition amongst its vendees and subvendees and enable him to maintain his prices for his medicine."

The averments of the bill are very general. Thus it is averred that:

"Some time since the class of stores known as 'department stores' and 'cut rate stores' have inaugurated a system of obtaining from cut rate wholesale and jobbing druggists and elsewhere, and offering for sale your orator's medicines, remedies, and preparations at retail prices lower than the prices fixed by your orator and stamped upon the cartons and packages. Said system is known as the 'cut rate' or 'cut price' system and resulted in much confusion, trouble, and damage to your orator's business, and has injuriously affected the reputation and depleted the sale of your orator's remedies, medicines, and preparations. Thereupon, and in order to protect its trade, custom, and business, and the manufacture and sale of his remedies, medicines, and preparations, your orator has established and put in force the following methods and system of governing, regulating, and controlling the sale and marketing of your orator's said medicines, remedies, and preparations."

Then, after setting out the system of contracts, which is now sought to be enforced, it is said:

"The entire purpose and object of the said system of contracts, serial num-

Digitized by Google

bers, lists, and cards being to prevent the cutting of prices and the demoralization of trade, both wholesale and retail in your orator's medicines and remedies, and the injury and damage resulting to your orator's aforesaid trade and business in the manufacture and sale of said remedies and medicines, as aforesaid, which said system and method your orator charges both in its form and purposes, and the prices therein fixed are reasonable, regular and proper, and which, if observed, will accomplish the aforesaid purposes and greatly benefit your orator in his aforesaid business by increasing the sales of and demands for his remedies, medicines, and preparations."

"These allegations," said the court below, "must be taken as true," and upon these he held that the complainants were advantaged by the covenants and injured if not so restrained. In this conclusion we cannot concur. Prima facie the contracts are plainly in restraint of trade. It was for the complainant to show that the covenants were not larger than necessary for his protection against an unjust use to the injury of complainant's retained business. Unless he could do this, he could not ask equitable relief under such covenants. This the bill does not do, unless the court is to be content with general averments that the competition methods called derisively the "cut rate" or "cut price" system had "demoralized," "confused," "troubled," and "damaged" the complainant's business. So, also, it is averred that the "system" had and will accomplish the suppression of the competition plan "and greatly benefit your orator in his business by increasing the sales of and demand for his remedies." Doubtless the "system" rigidly enforced will put an end to the "demoralization," the "trouble," and "confusion" incident to competition. But such an averment as this can be of no legal consequence, for it is no more than to say that a noncompetitive system of conducting trade and traffic in the line of articles made by complainant is of more advantage than the ordinary competitive system. That the suppression of even unreasonable competition will sanctify an agreement or combination to restrain trade will not be claimed. The whole economic system which has made our civilization is founded upon the theory that competition is desirable, and the common-law rules against restraints of trade rest upon that foundation. A partial restraint of competition may be upheld when one sells a business or other property, provided it is no greater than necessary to enable the vendor to realize the value of his good will or to secure to the buyer the enjoyment of his purchase, or to prevent the use of the property to the prejudice of the seller. But here the only competition which the contracts in question tend to suppress is competition between those who buy his goods to sell again. How the suppression of competition between his vendees and subvendees is to secure to him the enjoyment of the legitimate fruits of his contracts of sale, to which the restrictive covenants are supposed to be ancillary, or to protect him against an unjust competition, is not clear, and the bill states no facts from which we can determine whether these covenants are necessary and reasonable. The general averment that under the "cut rate" plan of doing business, demoralization and damage resulted, while under the "contract system" enlarged sales and increased emoluments have and will follow, does not answer the question as to why such covenants are necessary to protect complainant against con-

Digitized by Google

sequences which may fairly require protection. Looking to the averments of the bill as a whole and to the scheme of business as disclosed by the contracts themselves, we cannot escape the conclusion that the covenants restricting sales and resales have as their prime object the suppression of competition between those who buy to sell again. Any benefit to the retained business to result from them is manifestly but an incident of the main purpose, which is to benefit his vendees and subvendees by breaking down their competition with each other. Restraints which might be upheld if ancillary to some principal contract cannot be enforced if, when unmasked, they appear to be the main purpose of the contract and not subordinate. The covenants in the contracts signed by the retailers are not even collateral to any sales by the complainant, but to sales made by the wholesalers. Although they run to the complaint, their prime purpose is neither the protection of the retained business of the complainant nor of the wholesaler, but only to prevent competition between retailers. Covenants protecting the seller of property against the competition of the buyer, by its use against the business retained by the seller, which are upheld if not wider than necessary for that purpose, have been covenants where the main purpose has been to protect the seller himself against competition directed against his retained business. No instance has been called to our attention where the main purpose and principle, if not only result, is to protect buyers against the competition of each other. If such a principle shall find lodgment in the law, it must be upon economic reasons which are in conflict with those which now prevail. The single direct effect of the "system of contracts" is to limit and restrain the right of each wholesaler and each retailer to transact business in the ordinary way. Each obtains a price enhanced by the "system" over the "cut rate" or "cut price" method which had before prevailed, and which it was the object of the new plan to abolish. It may be that sales went on as before; but at a higher price to the consumer than would otherwise have been paid. In Addyston Pipe Co. v. United States, 175 U. S. 211, 244, 20 Sup. Ct. 96, 44 L. Ed. 136, it was said:

"We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restraining the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded."

It is no answer to such restrictive covenants that after all they only prevent injurious competition between such dealers and only result in maintenance of reasonable prices. These are not the tests by which the validity of such agreements are determined. In People v. Sheldon, 139 N. Y. 251, 264, 34 N. E. 785, 789, 23 L. R. A. 221, 36 Am. St. Rep. 690, it was said:

Digitized by Google

"If agreements and combinations to prevent competition are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon an actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity although the moral evidence might be very convincing."

This principle was very strongly approved by this court in the Addyston Pipe Case, so frequently referred to, and many other cases cited in its support. It has been suggested that we should have regard to new commercial conditions and a tendency toward a relaxation of old common-law principles which tend to prevent development on modern lines. This is an argument better addressed to legislative bodies than to the courts. Neither is it wise for the courts to countenance the introduction of artificial distinctions dependent upon the variant economic views of individual judges. Distinctions which are specious or analogies which are but apparent will but afford opportunities to whittle away broad economic principles lying at the bottom of our public policy, principles which have long received the sanction of statesmen and the approving recognition of a long line of jurists. A like argument is expected whenever some new method of circumventing freedom of commerce comes under the tests of the law. It was made and answered by Judge Taft in the Addyston Pipe Case with a strength to which we can add nothing.

Our conclusion is that complainant's system of contracts is not enforceable. The injunction must be discharged.

The case will be remanded, with directions to proceed as may be consistent with this opinion.

(153 Fed. 46.)

VAN GESNER v. UNITED STATES. BIGGS v. SAME. WILLIAMSON v. SAME. *

(Circuit Court of Appeals, Ninth Circuit. March 11, 1907.)

Nos. 1,369, 1,370, 1,368.

1. CRIMINAL LAW—REVIEW IN FEDERAL COURTS—ELECTION.

In a criminal case in a federal court which involves a constitutional question, after a judgment of conviction, the defendant is put to his election whether he will take the case direct to the Supreme Court of the United States on such question, or take the whole case to the Circuit Court of Appeals, and, where he elects the former, a writ of error subsequently taken out to the Circuit Court of Appeals will be dismissed.

2. PUBLIC LANDS—REGULATIONS OF LAND DEPARTMENT.

The Land Department of the United States has the power to make reasonable rules and regulations, not inconsistent with any valid law, for the purpose of giving effect to the provisions of the acts of Congress providing for the disposition of the public lands, which have the force and effect of law, and of which the courts take judicial notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 288.

Decisions of land department, their conclusiveness and effect, see note to Hartman v. Warren, 22 C. C. A. 38; Carson City Mining Co. v. North Star Mining Co., 28 C. C. A. 344; Unita Tunnel M. & T. Co. v. Creede & C. C. M. & M. Co., 57 C. C. A. 207.]

---

*Rehearing denied May 20, 1907.

Digitized by Google

3. PERJURY—PUBLIC LANDS—APPLICATION TO PURCHASE—TIMBER AND STONE ACT.

Under Timber & Stone Act June 3, 1878, § 1, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], which requires applicants to purchase land thereunder to file a verified written statement, and after the required publication of notice to "furnish to the register of the Land Office satisfactory evidence" of certain facts, the regulations of the Land Department, requiring such evidence to be in the form of depositions under oath, are in furtherance of the purposes of the statute and valid, and false swearing in either the preliminary statement or in such depositions constitutes the crime of perjury and an offense against the United States, under Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 23.]

4. CONSPIRACY—SUBORNATION OF PERJURY—PUBLIC LANDS—INDICTMENT—AVERMENT OF WILLFULNESS.

Where the facts alleged, in an indictment for conspiracy to commit an offense against the United States by subornation of perjury in proceedings to acquire public lands, necessarily import willfulness on the part of the persons giving such testimony, the failure of the indictment to use the word itself is not fatal.

5. SAME—COMPETENCY OF EVIDENCE.

Under an indictment for conspiracy to commit an offense against the United States by subornation of perjury in procuring persons to make application for the purchase of lands under the timber and stone act, under agreements to convey the same to defendants, and to falsely swear, among other things, that such lands were chiefly valuable for timber, it was not error to permit the government to prove that the lands were not valuable for the timber upon them, but were chiefly valuable for grazing purposes, although such evidence tended to show that the lands were not subject to entry under the act.

6. CRIMINAL LAW—EVIDENCE—OTHER OFFENSES—EVIDENCE OF MOTIVE.

An indictment for conspiracy to commit an offense against the United States by subornation of perjury charged that defendants procured and instigated a number of persons to make application for the purchase of public lands in a certain township under the timber and stone act, and to falsely swear in their applications and proofs that they were not seeking to purchase such lands on speculation, but for their own exclusive benefit and use, and that they had not made any contract or agreement by which the title would inure to the benefit of another; whereas, in truth and fact, such persons were applying to purchase the lands on speculation and under prior agreements to convey the title to defendants. *Held*, that under such indictment the motive of the parties to the transactions was a material fact to be proved, and that evidence that defendants had induced other persons to file on or purchase state lands in the same vicinity, which were subsequently conveyed to defendants, was properly admitted, where the jury were instructed to consider it only as bearing on such question of motive.

7. SAME.

Under such indictment, it was also competent for the government to show, by the persons who made such applications to purchase lands, that it was their intention and understanding at the time that the lands should be conveyed by them to defendants, contrary to their sworn statements and testimony.

In Error to the Circuit Court of the United States for the District of Oregon.

A. S. Bennett and H. S. Wilson, for plaintiffs in error.

Francis J. Heney, Sp. Asst. to Atty. Gen., and William C. Bristol, U. S. Atty., for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

Digitized by Google

ROSS, Circuit Judge. These cases were tried and submitted together; the plaintiffs in error being jointly charged by indictment with the crime of conspiracy to suborn perjury, in violation of the provisions of section 5440 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3676]. In respect to the plaintiff in error Williamson, this statement is made in the brief of counsel for the plaintiffs in error, to wit:

"Prior to the writ of error in this case, the defendant Williamson, who was a representative in Congress, had sued out a writ of error to the Supreme Court of the United States, based upon the holding of that court, in the Burton Case, that a sentence of imprisonment against a member of Congress involved a constitutional question, giving the right of appeal direct to that court. At the time the writ of error was sued out in this case, the constitutional question in the Burton Case had never been decided. This writ of error to this court in the Williamson Case was sued out after the writ to the Supreme Court, and out of abundance of caution in case the writ to the United States Supreme Court should be dismissed upon jurisdictional grounds. The jurisdiction of this court, therefore, in the Williamson Case, depends upon whether the United States Supreme Court shall entertain jurisdiction thereof, and, if it holds that it has jurisdiction to pass upon the merits, then the proceedings in this court necessarily fail. If the Supreme Court should take jurisdiction in the Williamson Case, and pass upon the merits, its decision will necessarily be controlling in all these cases, as the record and questions presented (except the constitutional one) are identical."

Upon this statement of counsel for the plaintiff in error, we are of the opinion that the writ in respect to the plaintiff in error Williamson must be and hereby is dismissed. He was put to his election whether he would appeal from the judgment given against him directly to the Supreme Court upon the question of jurisdiction alone, or bring the whole case to this court, in which event this court could, if it deemed proper, certify the question of jurisdiction to the Supreme Court, or the case be taken there by that court by its writ of certiorari. Spreckels Sugar Refining Co. v. McClain. 192 U. S. 397–407, 24 Sup. Ct. 376, 48 L. Ed. 496; McLish v. Roff, 141 U. S. 661–667, 12 Sup. Ct. 118, 35 L. Ed. 893.

On behalf of the remaining plaintiffs in error, a number of points are made by counsel; the first going to the question of the sufficiency of the indictment.

It is a fundamental right of every defendant in a criminal case to insist that the indictment against him clearly charge an offense denounced by law, fairly inform him of the acts alleged to have been committed by him in violation of that law, and in a manner that will protect him in the event of a verdict of guilty, or acquittal, against any further prosecution for the same offense.

The statute under which the indictment in question is founded provides as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to" a prescribed penalty. Rev. St. § 5440.

The statute is very broad, and includes any and every case where two or more persons conspire, either to commit an offense against the

Digitized by Google

United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy. In any and every such case, each and every party to the conspiracy is guilty of the crime denounced by the statute, the gist of which is conspiracy. "This offense," said the Supreme Court in United States v. Britton, 108 U. S. 199–204, 2 Sup. Ct. 531, 534 (27 L. Ed. 698), "does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiæ, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows, as a rule of criminal pleading, that, in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

The indictment in question undertakes to charge against the defendants thereto the commission of the particular acts bringing them within the provisions of this law. It charges that they, together with divers other persons to the grand jurors unknown, did, on the 30th day of June, 1902, at Prineville, Or., conspire, combine, confederate, and agree together to commit an offense against the United States. That is to say, to unlawfully, willfully, and corruptly suborn, instigate, and procure a large number of persons, to wit, 100 persons, to commit the offense of perjury in the said district (of Oregon) by taking their oaths there, respectively, before a competent officer and person in cases in which a law of the said United States authorized an oath to be administered, that they would declare and depose truly that certain declarations and depositions by them to be subscribed were true, and by thereupon, contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be true. That is to say, to suborn, instigate, and procure the said persons, respectively, to come in person before him, the said Marion R. Biggs, who was then and there a United States commissioner for the said district of Oregon, and, after being duly sworn by and before him, the said Marion R. Biggs, as such United States commissioner, to state and subscribe under their oaths that certain public lands of the said United States, lying in Crook county, in said district of Oregon, open to entry and purchase under the acts of Congress, approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons, respectively, and that they had not, directly or indirectly, made any agreement or contract in any way or manner, with any other person or persons whomsoever, by which the title which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person, except

Digitized by Google

themselves, when, in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit, respectively, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, by which the titles which they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, as copartners in the firm of Williamson & Van Gesner, then and before then engaged in the business of sheep raising in said country. The matters so to be stated, subscribed, and sworn by the said persons being material matters under the circumstances, and matters which the said persons so to be suborned, instigated, and procured, and the said John Newton Williamson, Van Gesner, and Marion R. Biggs would not believe to be true; and the said Marion R. Biggs, United States commissioner, as aforesaid, when administering such oaths to those persons, being an officer and person authorized by law of the said United States to administer the same oaths; and the said oaths being oaths administered in cases where a law of the said United States would then authorize an oath to be administered.

The indictment further charges that, in pursuance of the said unlawful conspiracy, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the 30th day of June, 1902, at Prineville, Or., did unlawfully prepare a sworn statement in writing, for the signature of one Campbell A. Duncan, who was one of the persons who were to be suborned, instigated, and procured, as aforesaid; that is to say, a paper of the tenor following:

"Timber and Stone Lands—Sworn Statement.

"Land Office at The Dalles, Oregon, June 30th, 1902.

"I, Campbell A. Duncan, of Prineville, county of Crook, state of Oregon, desiring to avail myself of the provisions of the act of Congress of June 3, 1878, entitled 'An act for the sale of timber in the states of California, Oregon, Nevada and Washington Territory,' as extended to all the public land states by act of August 4, 1892, for the purchase of the S. 2 of N. E. 4 and S. 2 of N. W. 4 of section 14, township 15 S. of range 18 E. W. M., in the district of lands subject at The Dalles, Oregon, do solemnly swear that I am a native citizen of the United States, of the age of 34, and by occupation farmer; that I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements * * * nor, as I verily believe, any valuable deposits of gold, silver, cinnabar, copper or coal; that the land contains no salt spring or deposit of salt in any form sufficient to render it valuable therefor; that I have made no other application under said act; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit; that I have not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the government of the United States may inure in whole or in part to the benefit of any person except myself; and that my post office address is Prineville, Or. ———, Applicant.

"State of Oregon, County of Crook—ss.:

"——— do hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by ———), and

Digitized by Google

that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this ——— day of ———, 1902. ———."

The indictment then charges that, in further pursuance of the said unlawful conspiracy, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the 30th day of June, 1902, at Prineville, Or., did unlawfully prepare a certain other sworn statement for the signature of one Susie M. Duncan, who was another one of the persons who were to be suborned, instigated, and procured as aforesaid; that is to say, the sworn statement required of the said Susie M. Duncan as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the southwest quarter of section 14, in township 15 south, of range 18 east (reference being made to the Willamette meridian and bass line).

Similar alleged acts of the said Biggs in pursuance of the alleged unlawful conspiracy, and to effect the objects of the same, are charged in respect to various others of the 100 persons referred to in the indictment.

Section 1 of the Timber and Stone Act of June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], provides:

"That surveyed public lands * * * valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold * * * in quantities not exceeding 160 acres to any one * * * at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on similar terms as timber lands."

Section 2 of the act, so far as it is applicable to the present case, is as follows:

"Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation and valuable chiefly for its timber or stone * * * that deponent has made no other application under this act: that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the Land Office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for said lands, and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void."

The third section of the act, so far as here applicable, is as follows:

"Sec. 3. That upon the filing of said statement * * * the register of the Land Office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication at the expense of such applicant, in the newspaper published nearest the location of the

Digitized by Google

premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the Register of the Land Office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as hereinbefore required; secondly, that the land is of the character contemplated in this act * * * and, upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, 1872, the applicant may be permitted to enter said tract, and on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon."

By Act Aug. 4, 1892, c. 375, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1547), the provisions of the above-mentioned act were extended to all the public-land states.

The form of the "written statement" which the act of Congress requires applicants for such land to file with the register of the proper district, together with the form of the affidavit to be made by such applicant, prescribed by the rules and regulations of the Land Department, are, as have been shown, set out in the indictment, and the record further shows the printed form prescribed by the Land Office for the taking of the testimony of such claimant both direct and cross, together with the form of the certificate to be signed by a United States commissioner of the district certifying that the applicant personally appeared before him, and that each question and answer in the deposition was read to him in the presence of the commissioner before he signed his name thereto, and that the same was subscribed and sworn to before such commissioner at the time and place to be stated, and further certifying that the commissioner has tested the accuracy of the affiant's information and the bona fides of the entry by a close and sufficient oral cross-examination of the claimant and his witnesses, directed to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use, and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entryman shall inure in whole or in part to the benefit of any person or persons excepting himself, and that such commissioner is satisfied from such examination that the entry is made in good faith for the entryman's own exclusive use, and not for sale or speculation, nor in the interest nor for the benefit of any other person or persons, firm or corporation, and to which form is annexed this:

"Note: Every person swearing falsely to the above deposition is guilty of perjury and will be punished as provided by law for such offense. In addition thereto the money that may be paid for the lands is forfeited and all conveyances of the land, or of any right, title or claim thereto, are absolutely null and void as against the United States."

It is well settled that the Land Department has the power to make reasonable rules and regulations, not inconsistent with any valid law, for the purpose of giving effect to the provisions of the acts of Congress providing for the disposition of the public lands, which have the force

Digitized by Google

and effect of law, and of which rules and regulations the courts take judicial notice. Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; Knight v. Land Association, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; Orchard v. Alexander, 157 U. S. 385, 15 Sup. Ct. 635, 39 L. Ed. 737; Cornelius v. Kessel, 128 U. S. 461, 9 Sup. Ct. 122, 32 L. Ed. 482; Hawley v. Diller, 178 U. S. 495, 20 Sup. Ct. 986, 44 L. Ed. 1157; In re Kollock, 165 U. S. 533, 17 Sup. Ct. 444, 41 L. Ed. 813; Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C.) 104 Fed. 20–43; Id., 112 Fed. 4–11, 50 C. C. A. 79, 61 L. R. A. 230.

It is quite true, as argued by counsel for the plaintiffs in error, that no rule or regulation made by the Land Department is a law in the sense that it can make that a crime which is not made a crime by any statute of the United States. U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591. But the present is not a case in which the violation of a mere rule or regulation is made a crime; but, on the contrary, the crime charged against the plaintiffs in error is defined by the statutes of the United States, expressly defining and declaring what shall constitute the crime of conspiracy and the crime of perjury. Rev. St. §§ 5440, 5392 [U. S. Comp. St. 1901, p. 3653]. Not only is there no statute of the United States conflicting with the rule of the Land Department requiring any and every applicant to purchase land under the stone and timber act, to make proof by deposition of the facts required by the statute to be declared and sworn to in his preliminary written statement or declaration, but such rule is in furtherance of and in accord with the requirements of the statute in that regard.

It is perfectly plain, from the provisions of the statute and the rules and regulations of the Land Department, that, in order for any person to effect a purchase of any land under the act in question, he must first make an application to purchase by a verified written statement, which statement is an affidavit as to the truth of the matters therein declared, and, after a compliance with the prescribed procedure, must satisfy the register of the local Land Office by deposition, in which he and such witnesses as he may produce are examined and cross-examined under oath, of the truth of the matters required by the statute to be shown as a prerequisite to the authorized purchase. It is just as plain that intentional false swearing by the applicant in either instance, in respect to any of the material matter so required to be declared and sworn to, constitutes the crime of perjury, which crime is defined, not by any rule or regulation of the Land Department, but by a statute of the United States.

The indictment, in effect, charged the defendants thereto with having conspired to falsely, willfully, and corruptly suborn, instigate, and procure certain named persons to commit the crime of perjury within the district of Oregon, by knowingly and intentionally swearing falsely to material matter required to be stated and shown both in the verified written statement or declaration, and in the proof by deposition. The whole scheme, as alleged, and proved to the satisfaction of the jury, shows beyond question that the false swearing contemplated by the conspiracy could not have been otherwise than willful

Digitized by Google

on the part of the instigated persons. When the facts alleged necessarily import such willfulness, the failure to use the word itself is not fatal. Such failure, under such circumstances, would not be fatal even at common law. C. R. L. 309; Archbold's Cr. Pl. 429. See, also, U. S. v. Howard (D. C.) 132 Fed. 350, 351.

It is not the name but the essence of the thing that should control the court in the administration of justice. As has already been said, the gist of the offense charged against the plaintiffs in error was the conspiracy, the object of which was the commission of the crime of perjury by numerous persons, in order that the conspirators might acquire the government title to the desired lands. "In stating the object of the conspiracy," said the court, in United States v. Stevens (D. C.) 44 Fed. 141, "the same certainty and strictness are not required as in the indictment for the offense conspired to be committed. Certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is required. When the allegation in the indictment advises the defendants fairly what act is charged as the crime which was agreed to be committed, the chief purpose of pleading is attained. Enough is then set forth to apprise the defendants so that they make a defense." See, also, Noah v. United States, 128 Fed. 272, 62 C. C. A. 618; United States v. Eddy (C. C.) 134 Fed. 114; U. S. v. Rhodes (C. C.) 30 Fed. 431.

We are of the opinion that the indictment is sufficient, and that the court below did not err in permitting proof of the false swearing of the instigated parties both in respect to their declaration in the verified written statement or application to purchase, and in the final proof made by deposition.

The plaintiffs in error also assigned for error various rulings of the trial court upon objections made by them to the admission of evidence. In passing upon such questions, it must not be forgotten that the character of the case is to be taken into consideration. It appears from the record that there was evidence tending to show that Williamson & Gesner were partners in the sheep business, and had a summer range for their sheep in what is called the "Horse Heaven Country," in Crook county, Or., about 25 miles from the town of Prineville, where they as well as Biggs, resided. The latter was a practicing attorney and a United States commissioner. The evidence also tended to show that all of the odd numbered sections of land in the township, in which was the summer range of Williamson & Gesner, were owned by a certain wagon road company from which Williamson & Gesner had leased for a number of years, for grazing purposes, some of those odd numbered sections; that in May, 1902, Williamson & Gesner learned that Morrow & Keenan, a rival sheep firm, had secured from the wagon road company a lease of practically all of its odd numbered sections in the township, and after endeavoring, without success, to defeat the consummation of the lease, Williamson & Gesner employed a surveyor to run the lines of the various sections of the township for the purpose of determining whether the springs and streams of water in the township were on the odd or even numbered sections, which survey showed that the most valuable springs and streams

Digitized by Google

were upon the even numbered sections, still owned by the government. The evidence tended to show that this township, while partially covered with small timber having no market value at the time, had extensive stretches of fine grazing land with no timber thereon. The evidence further tended to show that Gesner employed Biggs to secure persons to apply to purchase this land under the timber and stone act, and that 45 such persons made application to purchase land selected for them by Gesner within the said township within a period of about two months; the necessary money for which being advanced by Gesner & Williamson. The evidence further showed that Biggs, Gesner, Williamson, and the latter's wife, applied to purchase similar land at the same time, with a number of the other applicants.

The prosecution was allowed to introduce evidence, over the objection and exception of the defendants, to the effect that the lands so applied for were not chiefly valuable for the timber upon them, but, on the contrary, were more valuable for grazing purposes. It is contended, on behalf of the plaintiffs in error, that the conspiracy, according to the averments of the indictment, "contemplated that subornation of perjury should take place only when lands subject to entry under the timber and stone acts were being applied for," and therefore that evidence tending to show that the lands applied for by the instigated parties were not of the character embraced by those acts was incompetent. This objection proceeds upon an erroneous view of the indictment, which does not charge that the conspiracy alleged contemplated that the subornation of perjury should take place only when lands subject to entry under the timber and stone acts were being applied for, but that the instigated parties would so swear —which is an entirely different thing, and quite in line with the alleged fraudulent scheme. It is clear from the language of the statute itself that it is only lands that are chiefly valuable for the timber on them that are authorized to be purchased under the acts in reference to timber lands; but, if authority to that effect be needed, it is found in United States v. Budd, 144 U. S. 167, 12 Sup. Ct. 575, 36 L. Ed. 384.

The prosecution was also permitted, over the objection and exception of the defendants, to introduce evidence against the defendants Gesner & Williamson tending to show that Gesner had tried to induce one Penny to apply to the state of Oregon for school land in the same vicinity for the benefit of Williamson & Gesner, and also tending to show that he had induced one Mary Swearingen to file on state land, and that she had made the necessary affidavit and filed on the land, and afterwards transferred it to the firm of Williamson & Gesner. The case shows that the government relied upon a chain of circumstances to prove that the defendants procured each and every one of the 45 entrymen to swear falsely in making his application, and in making his final proof, by swearing that he was not seeking to purchase the land on speculation, but for his own exclusive use and benefit, and that he had not, either directly or indirectly, made any contract or agreement with any person by which the title which he might acquire to the land would inure to the benefit of another

Digitized by Google

person; whereas, in truth and in fact, he was applying to purchase the land on speculation and under a prior agreement to convey the title to the defendants Williamson & Gesner as soon as he acquired it from the government. It is manifest, therefore, that the motive of the respective parties to the transactions in question was of prime importance in the inquiry, and it was to that point only that the court below allowed the evidence now under consideration, being careful, both in admitting it and in the instructions to the jury, to limit the evidence to the question of motive and to the defendants Williamson & Gesner. In so doing, we think the court below committed no error. In Wood v. United States, 16 Pet. 343, 10 L. Ed. 987, Mr. Justice Story, speaking for the Supreme Court, said:

"Where the intent of the party is matter in issue, it has always been deemed allowable as well in criminal as in civil cases to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment."

See, also, Moore v. U. S., 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996; Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21; Wolfson v. U. S., 101 Fed. 434, 41 C. C. A. 422.

It is assigned for error that the trial court erred in its rulings in respect to the testimony of a number of witnesses for the government as to what their intention or understanding was when making their verified statement in respect to the land applied for, and when making their final proof in respect to the disposition of the land after they should acquire it from the government. All of such testimony was directly responsive to the allegations of the indictment, under which it was clearly competent for the prosecution to prove that the various entrymen swore falsely in respect to the material matters stated in their preliminary application for the land, and in their final proof, and that the real intention of all of the parties concerned was the obtaining of the government title to the land by means of such perjuries for the benefit of Williamson & Gesner. We see no error in the rulings of the trial court in the respects complained of; and, in respect to the charge of the court to the jury, a careful consideration of it satisfies us that it was eminently fair, and covered every aspect of the case in a very lucid manner. There was, therefore, no error in refusing any requested instruction.

The facts of the case were, as a matter of course, for the determination of the jury.

The judgment is affirmed.

(153 Fed. 56.)

ST. LOUIS & S. F. R. CO. v. DEWEES.*

(Circuit Court of Appeals, Eighth Circuit. April 24, 1907.)

No. 2,360.

1. TRIAL—QUESTION FOR COURT OR JURY—NEGLIGENCE—DIRECTION OF VERDICT.
It is undoubtedly true that cases are not lightly to be withdrawn from the jury, and that ordinarily negligence is so far a question of fact that it should be submitted to and determined by them; but it is equally true that when the evidence and the inferences to be reasonably drawn

*Rehearing denied June 10, 1907.

Digitized by Google

from it are undisputed, or are of such conclusive character that the exercise of a sound judicial discretion would permit the court to give effect to but one verdict, the case may and should be withdrawn from the jury and a verdict directed for the plaintiff or the defendant, as the one or the other may be proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 377, 379.]

2. MASTER AND SERVANT—RULES—OBEDIENCE BY SERVANT.

Where the duties of a servant in given circumstances are particularly specified in the unambiguous and reasonable rules of the master, of which the servant has knowledge and to which he has assented by entering and continuing in the service, his nonobservance or disobedience of them at a time when they are capable of observance is negligence as matter of law, and is not to be judged by the undefined and varying requirements of ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 759–775.]

3. SAME—RULES—REASONABLENESS—VIOLATION—NEGLIGENCE.

Rules of a railroad company requiring the engineer to keep a careful lookout for signals, to stop the train when a signal is not understood, or is imperfectly displayed or absent from its usual place, and expressly requiring that he "must know," when approaching a switch, that it is in proper position, are reasonable and valid. And where the engineer, in approaching a known switch, at which designated and known signals were customarily displayed to indicate whether the switch was closed or open, either took proper observations, learned that the switch was open, and took chances upon being able to go safely through the same at great and unwarranted speed, or, knowing that he was approaching the switch, and not knowing whether it was closed or open, took chances on its being in proper position, and so drove into the switch when it was open, whereby the train was wrecked and he was killed, *held*, he was guilty of contributory negligence, preventing a recovery for his death.

4. SAME—SPECIAL TRAIN ORDERS—EFFECT.

A wrecked train, of which intestate was the engineer being unable to conform to the regular schedule, was being run under special telegraphic orders directing it to run late, according to a special schedule therein given. The train dispatcher who issued the order testified that it "simply set the train back"; and a general rule of the company, of which the engineer had knowledge, required him to run "steadily and uniformly, adhering as closely to time as due regard for safety permits." *Held*, that such special orders should be construed merely to require the engineer to adhere to them as closely as due regard for safety permitted, and did not abrogate the standing rules of the company requiring engineers, on approaching switches, to know that they are in proper position, etc.

5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE PREVENTING RECOVERY.

One cannot—nor can one standing in his stead—recover damages for an injury to the commission of which he has directly contributed; and it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been a proximate cause of the injury, he—as also one standing in his stead—is without remedy against another, also in the wrong.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 84.]

Adams, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Kansas.

Digitized by Google

James Black (I. P. Dana, L. F. Parker, and W. F. Evans, on the brief), for plaintiff in error.

W. R. Biddle (Hubert Lardner, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This was an action under a Kansas statute by a widow to recover damages of a railroad company for the death of her husband, Charles A. Dewees, alleged to have been caused by the negligence of the company and its employés. The plaintiff obtained a verdict and judgment, and the defendant has brought the case here; its chief contention being that there was error in refusing its request for a directed verdict. In Kansas the fellow-servant rule of the common law has been abrogated as respects employés of railroad companies. Gen. St. Kan. 1901, § 5858.

At the time of his death, Dewees was a locomotive engineer in the service of the railroad company, and was driving the engine of a north-bound passenger train called the "Meteor." While proceeding at a speed of 50 or 60 miles an hour, the train was wrecked in the circumstances here stated; he and the fireman being among those who lost their lives. The accident occurred at Godfrey, a small station in Kansas, at which a passing track of considerable length lies east of the main track and is connected therewith at either end by a switch. A north-bound freight train had become temporarily stalled on the main track between these switches, and they had been opened to permit other trains to use the passing track while the blockade of the main track continued. The passing track was adequately constructed for the purposes for which it was designed and used, but, as was well known, it was not designed or used to carry trains running at great speed. Three trains, a north-bound passenger and two south-bound freights, made the passage in safety. The Meteor was the fourth train to approach while the blockade continued, and was wrecked in consequence of running through the open switch at the south end of the passing track, and onto that track, at the great speed before named. East of the switch was an upright switch stand 7 feet in height. At its top was a red disk 16 inches in diameter, which, when the switch was closed, could not be seen from along the track, and, when the switch was open, presented one red face to the south and the other to the north. Above the disk was a lamp with four faces, two green and two red. When the switch was closed, one green face was to the south and the other to the north, and, when the switch was open, the red faces took the places of the green ones. The accident occurred at 4:54 in the morning, when it was dark, windy, and a little foggy. Whether the lamp in the switch stand was lighted, and whether the rear brakeman of the stalled train made use of certain prescribed signals to advise the Meteor of the existing situation, as was required by the rules of the railroad company, were subjects in respect of which the evidence was quite conflicting; so, for the present purposes, it must be assumed that the lamp was not lighted, that the prescribed signals were not given by the brakeman, and that this negligence was a proximate cause of the accident. We turn, there-

Digitized by Google

fore, to that phase of the case which relates to the conduct of Dewees.

Among the rules prescribed by the railroad company for the operation of its trains, with which Dewees was familiar and of which he carried a copy, were these:

"General Notice. * * * Obedience to the rules is essential to the safety of passengers and employés, and to the protection of property. * * *"

"(27) A signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a stop signal, and the fact reported to the trainmaster."

"(106) In all cases of doubt or uncertainty the safe course must be taken and no risks run."

"(267) Conductors and enginemen are cautioned against reckless running. They must run steadily and uniformly, adhering as closely to time as due regard for safety permits."

"(358) They [the enginemen] must keep a careful lookout on the track for signals and obstructions; look back frequently and know that their train has not parted, obey all signals, even if considered unnecessary; stop and inquire respecting signals not understood. * * *

"(359) When approaching switches the engineer must know that they are in proper position. * * *"

"(412) The company does not require or expect its employés to incur any risk, from which, by the exercise of their judgment and by personal care, they can protect themselves, but enjoins upon them and demands that they shall take time and use the means necessary to, in all cases, do their duty in safety."

The existence and location of the station, switch, and switch stand, the character and meaning of the signals usually displayed at the switch stand, and the proper use of the passing track, were well known to all experienced engineers on that part of the road. This was Dewees' first trip on the Meteor, but he was an experienced engineer, had driven engines over that part of the road almost daily for eight or nine years, was perfectly familiar with it, and was accustomed to determining his locality by familiar objects along the road, and by its grades, curves, and other features. As he approached the station from the south, he passed different fixed objects in plain view from his side of the engine, among them being the whistling sign one mile from the station and 4,100 feet from the switch. He heeded this sign by sounding the whistle for the station, and 3,000 feet from the switch he passed from a downgrade of 6 inches to an upgrade of 9 inches to every 100 feet, and from a straight line to a one degree curve to the left. The engine was a good one, and had a strong electric headlight which shone plainly upon all objects along the road before they were reached, and lighted up the switch stand and its surroundings so as to bring them within his range of vision when they were 1,200 feet away. The engine and cars were equipped with air brakes which gave him such control over the train that, by an emergency application of the air, it could be brought to a full stop in 1,000 feet, and, by a service application, could be brought to a speed of six miles an hour in 1,200 feet, although it could pass through the switch and over the passing track in entire safety at double or treble that speed. The switch was open, and therefore not in proper position for the train to proceed at great speed. The lamp in the switch stand did not show green, the signal for a closed switch. If lighted, it showed red, the signal for an open switch; and, if not lighted, there was an absence of a signal at a place where a signal was usually shown, which, as properly conceded in the

Digitized by Google

instructions requested by the plaintiff, "was a warning." And whether or not the lamp was lighted, the red disk, 16 inches in diameter, was so turned as to show that the switch was open. While, as before said, it was dark, windy, and a little foggy, the evidence, including that for the plaintiff respecting the distances at which different lights and objects were seen at the time, makes it plain that, with the strong electric headlight on his engine, Dewees could have observed the conditions at the switch stand at any time after he came within 1,200 feet thereof. But, if the weather had prevented such observation, it would still be beyond question that he knew the relative location of the whistling sign, the switch, and the station, knew he had passed the whistling sign and at what speed he was running, did not know whether the switch was in proper position, and yet proceeded *all the way to it* at a speed of 50 or 60 miles an hour with the disastrous results before stated. He made no application of the air at his command, and his conduct was not induced by any false or misleading signals, for there was none. There was no evidence that any of the rules before set forth, or the use of the signal lamp at the switch, had been abandoned or fallen into disuse.

It is undoubtedly true that cases are not lightly to be withdrawn from the jury, and that ordinarily negligence is so far a question of fact that it should be submitted to and determined by them, but it is equally true that when the evidence and the inferences to be reasonably drawn from it are undisputed, or are of such conclusive character that the exercise of a sound judicial discretion would permit the court to give effect to but one verdict, the case may and should be withdrawn from the jury and a verdict directed for the plaintiff or the defendant, as the one or the other may be proper. Southern Pacific Company v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485; Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Chicago Great Western Ry. Co. v. Roddy, 65 C. C. A. 470, 131 Fed. 712. In our opinion this was such a case. The evidence reasonably permitted of either of two conclusions, but none other: One, that Dewees took proper observations, learned that the switch was open, and took chances on being able to go safely through the same and over the passing track at great speed; the other, that, knowing he was approaching the switch, and not knowing whether it was closed or open, he took chances on its being in proper position. In either event he was culpably negligent. It is conceded that negligence is necessarily deducible from the first conclusion, but that it is thus deducible from the second is questioned, and this upon the theory that his conduct must be judged by the standard of ordinary care, and that it cannot be said as matter of law that, in attempting to pass the switch without knowing whether it was closed or open, he failed to conform to this standard. The theory is not sound. His duties in the circumstances were not left to the undefined and varying requirements of ordinary care, but were particularly specified in the rules of the railroad company of which he had knowledge and to which he assented by entering and continuing in its service. An instruction giving effect to the theory so advanced was disapproved by this court in Northern Pacific Ry. Co. v. Cummiskey, 70 C. C. A. 92, 97, 137 Fed. 508, 513, where it was said by Judge Hook:

Digitized by Google

"To the jury, therefore [that is, by the instruction], was committed the determination of the question whether ordinary care required the doing of that which the company contends it required by a specific rule applicable to the case. If the rule applied, and it imposed upon Cummiskey the duty to send a flagman or to go back himself and flag the approaching passenger train, it was error to make the existence of that duty dependent upon the conception of either court or jury of the requirements of ordinary care. There was no contention that the rule was unreasonable or that Cummiskey was not fully cognizant of it."

And to the same effect is Erie R. Co. v. Kane, 55 C. C. A. 129, 143, 118 Fed. 223, 237, where it was said by the Circuit Court of Appeals for the Sixth Circuit:

"Certainly, in so far as it and that part of the charge which related to the other portion of the rule left it to the jury to determine whether decedent's action was prudent and careful, even though it may have been in violation of the rule, it was erroneous. They contained the vice of the instruction disapproved by this court in the case of Railway Co. v. Craig, 73 Fed. 642, 19 C. C. A. 631; Id., 80 Fed. 488, 25 C. C. A. 585, on the last hearing herein. They left it to the jury to determine whether the violation of said portions of the rule was negligence, when the jury should have been told that such action was negligence, as a matter of law, and that, therefore, if said portion of said rule had been violated, and the violation thereof contributed to the injury, they should find for the defendant."

The rules of the railroad company not only required the engineer to keep a careful outlook for signals and laid upon him the duty of stopping the train where a signal was not understood, or was imperfectly displayed or absent from its usual place, but also expressly enjoined that, when approaching a switch, he must know that it was in proper position. To read these rules is to understand that they required him to ascertain by whatever means and by whatever use of time were necessary whether the switch was closed or open before attempting to pass it. They were unambiguous, reasonable, and designed for his protection, as also that of his fellow servants, the traveling public, and the railroad company. Their observance was therefore a matter of common concern. They were capable of observance in the circumstances, and, if observed, would have prevented the accident. He did not observe them, and this was, as matter of law, negligence. Kansas, etc., Co. v. Dye, 16 C. C. A. 604, 70 Fed. 24; Erie R. Co. v. Kane, 55 C. C. A. 129, 118 Fed. 223; Francis v. Kansas City, etc., Co., 110 Mo. 387, 395, 19 S. W. 935; Louisville, etc., Co. v. Mothershed, 110 Ala. 143, 20 South. 67; Illinois Central R. R. Co. v. Guess, 74 Miss. 170, 21 South. 50; Norfolk & Western R. R. Co. v. Williams, 89 Va. 165, 15 S. E. 522; Green v. Brainerd, etc., Co., 85 Minn. 318, 88 N. W. 974; Chicago, etc., Co. v. Flynn, 154 Ill. 448, 453, 40 N. E. 332; Lake Erie & Western R. Co. v. Craig, 25 C. C. A. 585, 80 Fed. 488. As was well said in the last case:

"The doctrine that the master operating a complicated and dangerous business may and must make reasonable rules for the guidance and safety of the employés, that the employé must yield obedience, and takes upon himself the consequences of disobedience, is a doctrine that is eminently wise, and founded upon the highest considerations of justice and humanity. The master's right to protect himself from heavy pecuniary liability in the operation of a large business is most important. His duty, by suitable regulations, such as are suggested by experience, to protect as far as may be the servant

Digitized by Google

from risk of injury to himself as well as injury from a fellow servant, for which the master is not pecuniarily liable, and for which there is practially no remedy, is a duty justly imposed by law. And the still higher considerations of the preservation of human life, and the prevention of serious physical maiming and disability with the attendant suffering and impairment of usefulness, furnish the fullest support and sanction to the doctrine. And the law knows no such incongruity as holding the master to the duty of making with the right of making, without at the same time requiring from the servant full conformity to the regulations."

But it is urged that the Meteor was running under a special order which superseded, or at least rendered inapplicable, the rules before set forth, and especially the one requiring the engineer, when approaching a switch, to know that it was in proper position. The train, being late, was unable to conform to the regular schedule, and so the train dispatcher issued the following order, which was duly communicated to Dewees, and also to the employés of other trains on that part of the road:

"No 110 [the Meteor], engine 189, will run late as follows: Leave Columbus 3:45 a. m.; Scammon 3:56 a. m.; Cherokee 4:07 a. m.; Girard 4:26 a. m.; Farlington 4:36 a. m.; Anna 4:46 a. m.; Godfrey 4:54 a. m.; Edwards 4:56 a. m.; arrive at Fort Scott 5:04 a. m."

The argument is that this was a special order requiring the stations named to be made at the times designated, and was an assurance that the track would be kept clear so that this could be done, and therefore that the engineer was relieved of the duties ordinarily imposed by the rules. This is plainly an erroneous view of the order. The train dispatcher, who issued it, in testifying as a witness for the plaintiff, said, "this order simply set the train back"; and we think it was nothing more than a special schedule, which for that occasion superseded the regular one in respect of time. It did not purport to give that portion of the road over to the running of this train alone, or to take from the employés and passengers thereon the protection which would be afforded by the rules if it were running according to the regular schedule. Nor did the order indicate that the time of the special schedule should be adhered to more closely than if it were the regular one. A rule, as before shown, made it a duty to adhere to time as closely "as due regard for safety permits," and as it made no distinction between regular and special schedules, and, as no reason for such a distinction in this instance is perceived, we think it applied equally to both, and that the qualifying clause placed regard for safety, as defined by the rules, above regard for schedule time. In ruling upon a like question, it was said in Illinois Central R. R. Co. v. Neer, 26 Ill. App. 356, 359:

"It is said he [the engineer] was under instruction to make the run within a certain time, and that he was attempting to comply with this order. All trains are under instructions to make certain time, but that does not modify or dispense with the standing rule as to the care to be observed in approaching a station."

And upon a subsequent hearing of the same case it was said (31 Ill. App. 126, 136):

Digitized by Google

"We apprehend that special orders to make runs in a specified time are never absolute. Of necessity they must be conditional, and their execution must be undertaken with that understanding."

In the case of Northern Pacific R. R. Co. v. Poirier, 167 U. S. 48, 54, 17 Sup. Ct. 741, 42 L. Ed. 72, the question arose whether a conductor, who was running in the nighttime upon special telegraphic orders without any schedule or time-card, and who was without notice that a preceding train would stop at a spur track which was not a regular station, was relieved from observing the usual rules of the railroad company, and it was held that he was not, the court saying:

"One of the plaintiff's witnesses, Allen, the rear brakeman on the first train, testified that the second train was 'running by telegraphic orders and had no schedule orders or time card.' This was doubtless true, as it is true of every 'wild' or extra train; but such a fact by no means warrants the inference drawn by the trial court and given in the charge to the jury that 'the train was running under special orders as to the time it was to make, where it was to go and when it should reach the different stations.' It cannot be justly inferred from the mere fact that the second train was a 'wild train' that its conductor was relieved from obeying the laws of the company."

And again:

"Assuredly more evidence must be given than the mere fact that the second train was a 'wild' train, not running on schedule time, to justify an inference, by either court or jury, that the conductor was relieved by such fact from regarding the rules of the company regulating the running of its train. Nor does the statement of the conductor of the second train, that he had not been notified that the first train was to stop at Clyde Spur, show that he had any right to dispense with the rules."

At Anna, the next station south of Godfrey, the Meteor met two south-bound freight trains which went upon a side track to permit the Meteor to pass, and, when it was doing so, the conductor of the second freight train gave a signal which it is claimed justified Dewees in believing the main track was clear from that point to his destination, Ft. Scott. Apart from the fact that this conductor could not know what occurred along the road after he passed over it, and could give no assurance that it would be clear when Dewees came to pass over it, the evidence in respect of this signal shows that it had no such significance as claimed. The entire evidence is as follows:

"Q. When he [Dewees] came up to your train, did you give any signal? A. Yes, sir.

"Q. What signal did you give him? A. Commonly known as the 'high-ball.' We were in the clear and I gave him the signal up and down to let him know we were in the clear.

"Q. What is the meaning of that signal. A. What I meant was that the main line was clear at Anna and that I was in the clear. That is what I meant by it.

"Q. Then he passed ahead? A. He passed by."

Thus the full significance of the signal was that this freight train had pulled into the siding at Anna a sufficient distance to be clear of the main track and to permit the Meteor to pass in safety.

It is said that the duty of keeping a careful lookout for signals did not devolve upon the engineer alone, but upon the fireman as well; that, by reason of the curve in the track, the fireman could observe the conditions about the switch stand before they could be observed

Digitized by Google

by the engineer; that he was entitled to rely upon the fireman taking proper observations, and, for aught that appears, may have acted upon inaccurate information given by the latter, or upon the supposition that, unless he advised to the contrary, the switch was in proper position. Both the engineer and fireman lost their lives in the accident, and there is no direct evidence of what, if any, observations were taken by either, or of what, if anything, transpired between them. It cannot be presumed that the fireman rather than the engineer was negligent, and there is no evidence to that effect. True, both were required to keep a careful lookout for signals, but the engineer was in charge and could direct the fireman in his work, which included other important duties, such as shoveling coal into the fire box, which prevented continual observation on his part. The duty of taking observations for the safety of the train was chiefly the engineer's, and the fireman was his assistant. The switch stand was on the engineer's side, and could be observed by him almost as soon as by the fireman, and thereafter the engineer had the better opportunity for observation. He was in control of the movement of the train, and the duty of knowing that the switch was in proper position was, by the rules, expressly laid upon him. The switch was not in proper position. The lamp at the switch stand did not show green, which alone would indicate that the switch was closed. The disk was turned so as to show red, the sign that the switch was open. And yet the engineer, knowing that he was approaching the switch, and either knowing that it was open, or not knowing whether it was closed or open, drove his engine all the way thereto and into it at a speed which was permissible only in the event that he knew it was closed. These considerations, as it seems to us, preclude any other conclusion than that he did not observe the rules and was negligent.

The distinction between the duties and situation of the fireman and those of the engineer is further indicated in the opinion of this court in the fireman's case (St. Louis & San Francisco R. R. Co. v. Bishard, 78 C. C. A. 62, 64, 147 Fed. 496, 498), where it is said:

"The company claims that, as the switch was thrown for the passing track, the lamp, if burning, must have shown the red sign of danger, and that, if it was not burning when the Meteor approached, the mere absence of a light at that customary place was in itself a sufficient warning under a rule of the company to that effect. Here arises the principal contention of contributory negligence on the part of the fireman. It is said that it was his duty, especially in approaching stations, to keep a lookout for signals, and that, as his train was moving on the curve, his position on the west side of the engine would have enabled him to look along the chord of the arc and to detect either the presence of the red light at the switch stand or the absence of any light, as the case may have been, and that in either event it was his duty to immediately notify the engineer of the result of his observations. Counsel for the company requested the trial court to charge the jury that it was the paramount duty of the fireman to keep this lookout and to warn the engineer in time to avoid the danger, and that, if he could have seen the signal in time to warn the engineer and did not keep the lookout, then the verdict should be for the defendant. The request was denied. The trial court in lieu thereof charged the jury that it was the duty of the fireman to keep the lookout when not otherwise necessarily engaged. We are of the opinion that the trial court was right. There were other important and imperative duties which the fireman was required by the rules of the company and the nature of his position

Digitized by Google

to perform. Those rules expressly placed him under the supervision and direction of the engineer, and required him to obey the orders of the latter respecting the performance of his duties. In keeping a lookout on the track for signals, he was merely an assistant acting under the direction of the engineer, and it cannot be said that upon the occasion in question it was his paramount duty to be on the lookout at any particular moment. The rules did not so provide, and we cannot infer that the engineer so ordered. Other duties of moment may have demanded his attention elsewhere. Having due regard for that presumption which obtains in the absence of evidence, a court would not be justified in declaring from the record before us that the deceased was not, during the approach of the Meteor, engaged in the performance of some duty of his position or of some order of the engineer that prevented him from observing either the presence or absence of a red light at the switch stand. Moreover, the evidence showed that, even if the lamp had been burning and the fireman had been on the lookout at the precise instant, he could have seen the light just about four seconds before it came into the view of the engineer. Nor can we assume, in the absence of evidence, that if the fireman was on the lookout, and observed that there was no light at the switch stand, he did not seasonably notify the engineer who was in charge of the engine. It is not necessary for us to determine in this case whether the engineer was or was not remiss in the performance of his duties. Even if he was, it does not follow that his negligence is imputable to the fireman, or that the right of the latter or his personal representatives to recover for the injury so caused is in any wise impaired thereby. The negligence of the engineer, if there was such, cannot be visited upon the fireman unless he concurred therein, and there must be proof, not mere surmise of such concurrence."

After a careful examination of the record, and thoughtful consideration of the arguments of counsel, we are of opinion, for the reasons given, that the case is within this general and wholesome rule. One cannot—nor can one standing in his stead—recover damages for an injury to the commission of which he has directly contributed. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been a proximate cause of the injury, he—as also one standing in his stead—is without remedy against another also in the wrong, such as the railroad company here.

The judgment is reversed, with a direction to grant a new trial.

ADAMS, Circuit Judge (dissenting). I fully agree with the majority that the known violation of a rule of a railroad company adopted and promulgated to secure the safe operation of its trains amounts to such negligence as precludes recovery by any employé whose disregard of the rule occasions injury or damage to himself, and that such employé cannot excuse himself for such known violation of the rule by appeal to the doctrine of ordinary or reasonable care. An employé must, at his own peril implicitly obey all rules, whatever he or any other persons may think ordinary care on his part dictates. But a full recognition of his obligation in this respect does not, in my opinion, end inquiry in this case.

Whenever the occasion for performing an act required by a rule depends upon facts not subject to the control of the employé, and when he is required to inform himself of the existence of such facts before he is called upon to perform the act required, the doctrine of

Digitized by Google

ordinary or reasonable care must apply. He cannot be required to act until he knows or in the exercise of reasonable care ought to know of the requirement.

For the purpose of determining the question whether this case should have been taken from the jury because of contributory negligence of the deceased, we must treat the evidence most favorably to plaintiff and must therefore assume under the proof that neither red nor green colored light was displayed on the switch stand; but, on the contrary, that no light of any kind appeared there.

The engineer clearly was not required to slow down the train until he ascertained, or, in the exercise of reasonable care, could have ascertained, that no light was displayed on the switch stand. On the question whether the proof so conclusively established the engineer's want of care in failing to ascertain that fact as to prevent recovery because of his contributory negligence, I differ radically from the view entertained by the majority. I do not think it so clearly appears that the engineer in the exercise of due care could have discovered the want of a light on the switch stand in time to slow down the train before it reached the switch and was derailed that all reasonable men in the exercise of an honest and impartial judgment would say so. That is the test as frequently declared by us. On the contrary, I think the facts and circumstances surrounding the engineer and the running of his train at the time in question were such as left that issue fairly debatable and rendered it particularly appropriate for the consideration of a jury. The engineer, by reason of running on a curve at the time, was not brought into a line of vision of the switch stand until he came within twelve hundred feet of it. He was running on a special order requiring him to make the unusual speed of 50 to 60 miles per hour. The night was dark, windy, and foggy. The engine had run a long distance. The windows through which he had to look were presumably affected by smoke and fog. The engineer, as he approached the switch stand, had duties to discharge in running his train which required diversified attention. The discovery of the negative fact that no light was displayed was not easy, and in itself would reasonably have taken some time.

These and other facts like them, together with the reasonable inferences deducible from them, were, in my opinion, sufficient to require the submission of the issue of contributory negligence to the jury. They were not so essentially different from those involved in the Bishard Case referred to in the foregoing opinion as to require the radically different treatment which the majority gives them. In my opinion there was less evidence of contributory negligence in this case than in that. As no other reversible error is claimed to be disclosed by the record, I think the judgment should be affirmed.

Digitized by Google

(153 Fed. 67.)

BURDITT & WILLIAMS CO. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. April 9, 1907.)

No. 678.

1. CUSTOMS DUTIES—CONSTRUCTION OF STATUTE—DOUBLE DUTIES.

The schedules of the tariff acts of 1890 and 1897 are based on the principle of protection to American industry, and in the construction of their provisions no inference can be drawn against a particular construction, because it will result in imposing double or treble duties on an article by adding duties for each stage it is advanced in manufacture.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 10.]

2. SAME—CONSTRUCTION BY TREASURY DEPARTMENT.

The rule applied that a uniform construction given to a provision of a tariff schedule by the Treasury Department through a number of years, during which importations are made in reliance thereon, will not be overruled by the courts, except for cogent reasons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 10.]

3. SAME—CLASSIFICATION—ARTICLES MADE FROM COATED STEEL WIRE.

Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639], imposes a duty on steel wire smaller than No. 16 wire gauge of 2 cents per pound, with an additional duty of 1¼ cents per pound on articles manufactured from such wire, "and on iron or steel wire coated with zinc, tin, or any other metal two-tenths of 1 cent per pound in addition to the duty imposed on the wire from which it is made." In 1900 the Treasury Department ruled that articles manufactured from steel wire coated were subject to all three of such duties, but shortly thereafter, and in the same year, formally reversed such ruling, and has since uniformly ruled that the additional duty of two-tenths of 1 cent was not to be imposed on articles manufactured from coated steel wire. *Held*, that in view of the uncertainty of the language of the statute such uniform ruling by the executive department, continued for five years, would be treated as a practical construction of the act, and would not be reversed by the courts.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 147 Fed. 892.

Charles S. Hamlin, for appellants.

William H. Garland, Asst. U. S. Atty. (Asa P. French, U. S. Atty., on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This case arises on the construction of paragraph 137 of the customs act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639]), as follows:

"137. Round iron or steel wire, not smaller than number thirteen wire gauge, one and one-fourth cents per pound; smaller than number thirteen and not smaller than number sixteen wire gauge, one and one-half cents per pound; smaller than number sixteen wire gauge, two cents per pound: Provided, that all the foregoing valued at more than four cents per pound shall pay forty per centum ad valorem. Iron or steel or other wire not specially provided for

Digitized by Google

in this act, including such as is commonly known as hat wire, or bonnet wire, crinoline wire, corset wire, needle wire, piano wire, clock wire, and watch wire, whether flat or otherwise, and corset clasps, corset steels and dress steels, and sheet steel in strips, twenty-five one-thousandths of an inch thick or thinner, any of the foregoing, whether uncovered or covered with cotton, silk, metal, or other material, valued at more than four cents per pound, forty-five per centum ad valorem: Provided, that articles manufactured from iron, steel, brass, or copper wire, shall pay the rate of duty imposed upon the wire used in the manufacture of such articles, and in addition thereto one and one-fourth cents per pound, except that wire rope and wire strand shall pay the maximum rate of duty which would be imposed upon any wire used in the manufacture thereof, and in addition thereto one cent per pound; and on iron or steel wire coated with zinc, tin, or any other metal, two-tenths of one cent per pound in addition to the rate imposed on the wire from which it is made."

The importations consisted of rat traps, made of steel wire coated with copper. Some question arose at our bar whether the traps were made of coated wire, or whether the coating was done after the traps were put in shape, but the record shows that the former was the case. As said by the importer, practically the only question in the case is whether, on account of the wire being coated, the traps are subject to the additional duty of two-tenths of one cent per pound, stated in the concluding words of the paragraph in question. The ruling was against the importer, and thereupon it appealed to us.

In developing its position here, the importer says that the words "except that" in the proviso to which the imposition of two-tenths of one cent per pound is attached govern everything which follows them, leading to the result that "wire coated" is itself a manufacture of wire, so that the rat traps in question and coated wire are each of them manufactures especially and alternately provided for. The importer also claims that, on the ruling of the Circuit Court, a double duty is imposed, which, of course, is the fact. On the other hand, the United States makes no definite proposition beyond maintaining in general terms the result reached by the Circuit Court, except only that they rely upon Salt v. United States (C. C.) 127 Fed. 890, affirmed by the Circuit Court of Appeals in 134 Fed. 1021, 58 C. C. A. 442; and except, also, that they make some reference to "component material of chief value," which is inapplicable under the act of 1897. Salt v. United States is, also, to some extent relied on by the importer; but it affords no assistance to us because it arose from importations of manufactures of copper wire. Although copper wire and iron and steel wire are all covered by paragraph 137, yet the methods by which each is treated are so essentially different that we need make no further observation in reference to the decision thus cited pro and con.

The reliance which the importer places on the words "except that," to which we have referred, is not supported by any plausible reason therefor drawn from the context. It would have support if coated wire could be regarded a manufacture of wire, so as to be, as further suggested by the importer, an alternative for other manufactures of wire; but we will see that that proposition cannot be sustained. In no other aspect could these words relieve the particular portion of paragraph 137 in issue from the difficulties which present themselves. The words "and on" would still remain undisposed of, indicating that that portion is dislocated.

Digitized by Google

Although the objection by the importer on the point of double duty was given some weight by the Treasury in decision (22,474), hereafter cited, it is clearly of no assistance. There is a double duty on any construction of the statute, and the question is not one of double, but of treble, duty. However this may be, under the protective systems involved in the statutes of 1890 and 1897, duties specific and ad valorem were piled on each other so often that no particular inference can be drawn from any suggestion as to double duties or treble duties as applied to the case at bar. So, also, the claim by the importer that iron and steel wire coated is a manufacture of wire, and therefore is to be classed with other manufactures of wire, it is plain cannot be maintained. In support of this position, the importer cites several decisions of the Treasury, all of which were prior to the statutes of 1890 and 1897, and were either so remote or coupled with such special circumstances that they are of no assistance whatever. Under the practical rules of construction of customs statutes, to which commercial designations have so much relation, the mind which is fairly experienced perceives at once that giving an ordinary coating to wire does not constitute a new manufacture within the ordinary commercial sense of the expression, or within the meaning of such statutes. This topic was extensively developed by us in United States v. Proctor, 145 Fed. 126, 131, 76 C. C. A. 96, where we pointed out that the extract of nutgalls, although in such advanced state that it contained all the elements of tannin or tannic acid, had not changed its nomenclature so as to be said to be advanced into a distinctly new thing, as water is advanced into steam, or clay into alumina and its metal aluminum. Hartranft v. Wiegmann, 121 U. S. 609, 615, 616, 7 Sup. Ct. 1240, 30 L. Ed. 1012; Tidewater Company v. United States, 171 U. S. 210, 216, 18 Sup. Ct. 837, 43 L. Ed. 139; Allen v. Smith, 173 U. S. 389, 399, 19 Sup. Ct. 446, 43 L. Ed. 741; and United States v. Dudley, 174 U. S. 670, 678, 19 Sup. Ct. 801, 43 L. Ed. 1129. There remains, nevertheless, to be considered the proposition made by the importer that, on a fair and natural reading of the proviso applicable here, the specific duty of two-tenths of one cent is not to be levied, except on wire which has been coated and which is imported as such. We will return to this later.

The Board of General Appraisers did not discuss the particular topic before us, and the reason therefor is apparent. The appraiser at the port of Boston, where the merchandise was entered, assessed a duty of 40 per cent. ad valorem, plus 1¼ cents per pound. Nothing was said by him about the two-tenths of one cent. The protests of the importer were against the 40 per cent.; and those parts of the protests which name the proper duty to be assessed contained several possibly lawful rates, among the rest that of 2 cents, plus 1¼ cents, plus two-tenths of one cent, the very duty which was held by the Circuit Court to be lawful. This latter suggested rate is what is spoken of by the Board of Appraisers as "(c)". The Board rejected the 40 per cent. ad valorem duty; and, without discussion as to it, it accepted (c) exactly as it stood in the protests, so that the importer is now protesting a rate of duty suggested by itself. This is, nevertheless, without objection on the part of the United States, so that it remains for us to determine what assessment is in fact in accordance with the statute.

Digitized by Google

By a decision of the Treasury of April 20, 1900 (22,168), it was held that heddles, tinned, carried the specific duties now under discussion of 1¼ cents per pound and two-tenths of one cent for the tinning. Subsequently, by its decision of September 7, 1900 (22,474), the Treasury formally reversed its decision of April 20th, and held that the additional duty of two-tenths of one cent per pound was not to be imposed upon heddles manufactured of wire tinned. The heddles stand exactly for the rat traps here under consideration; and the decision of the Treasury of September 7, 1900, is directly in point. We are informed that, until the protests in this case, which bear date respectively on September 20, 1905, and October 13, 1905, the importations of this importer were constantly assessed without the addition of the two-tenths of one cent per pound, and duties were paid accordingly. The record shows no trace of any assessment of this additional duty anywhere, or any claim by the Treasury for any such assessment, during the five years which thus intervened. So absolutely uniform was the practice that, in the case before us, the appraiser, as a matter of course, added only 1¼ cents to the 40 per cent. ad valorem, although, clearly, the additional duty of two-tenths of one cent must be added to the ad valorem duty on iron or steel wire if added to the specific duty. Therefore, we have here a formal ruling of the Treasury, supported by five years continuous, uniform, and universal practice, and this with reference to the construction and practical operation of a statute which certainly must be held in doubt, in view at least of the fact that the experts of the Treasury gave it two absolutely opposite constructions within a period of less than six months.

Aside from this decision of the Treasury of September 7, 1900, and the practice following it, the paragraph in question has no satisfactory history, and no prototype, except as we may hereafter explain. It shows a dislocated form of expression, in that it uses the words "and on," which have no proper relation to any phraseology which precedes them. This suggests that it came in by an amendment, the circumstances touching which have in no manner been explained to us. Therefore it is practically impossible to apply the more ordinary rules of construction, except, on the one hand, that, where a question of interpretation of a customs statute is doubtful, the doubt will be resolved in favor of the importer—a general rule constantly repeated—and, on the other hand, that, applying a particular exceptional rule as to the statutes of 1890 and 1897, we must regard the policy running through them to be one of protection to our manufactures. Arnold v. United States, 147 U. S. 494, 497, 13 Sup. Ct. 406, 37 L. Ed. 253. The most which can be said as to general rules of construction is that the phraseology here interposed by Congress cannot be rejected, and must be interpreted in some way.

The importer finds support for his view of this paragraph in that the words on which the United States rely close the paragraph, and, by their mechanical arrangement, come in after the entire question as to the duty on these importations has apparently been disposed of. Therefore the importer's general position which we have stated—that the closing words have nothing to do with these importations—is not without some plausibility. On the other hand, the peculiar

Digitized by Google

words "and on" show that they were accidentally located. This leaves a plain right to test the intention of Congress by experimentally locating them elsewhere. Relocating them, therefore, in some part of the paragraph before the proviso assessing the duty of 1¼ cents per pound on manufactures from wire, the whole has an orderly reading; and it would then naturally be conceded that the position of the United States at bar was correct.

The particular expression in question was undoubtedly brought from paragraph 148 of the customs act of 1890. (Act Oct. 1, 1890, c. 1244, § 1, Schedule C, 26 Stat. 577). This paragraph commences with imposing a duty upon wire made of iron or steel, thus generally like the opening portion of paragraph 127 in issue here. Then later, in paragraph 148, come these words: "There shall be paid on iron or steel wire coated with zinc or tin, or any other metal, * * * one-half of one cent per pound in addition to the rate imposed on the wire of which it is made." This is exactly the phraseology, mutatis mutandis, found in issue here, the words "there shall be paid" being omitted. This mutilation, and the consequent dislocation to which we have referred, establishing our proposition of coming in by an amendment, justify the experimental relocation which we have suggested. The act of 1890 contains no specific duty on articles manufactured from wire in the form found in paragraph 137 of the present statute; but it guards against the manufactured article paying less than the duty imposed upon the wire from which it is manufactured, or which forms a component part of chief value. Under that act the duty on traps like those imported in this case was assessed under the more general provisions of the law; and we are told that it was assessed accordingly at 45 per cent. ad valorem, which was probably sufficient to promote the purpose of Congress, which had in view in this legislation the protection of our industries.

However, we have the rule for the interpretation of these statutes of 1890 and 1897, already stated, that they are to be regarded as intended for the protection of domestic industries; and, in that light, and, in accordance with the customary methods, we should expect an additional duty for each marked stage in advance which involves any considerable amount of labor. One of these stages would be the making of the plain wire; the second, the coating; the third, the manufacture of the specific article from the coated wire; and we would be entitled to assume that the phraseology should be relocated so as to carry out the general purpose of this class of legislation. After all, the natural interpretation of the statute is that wire is wire whether coated or not, and that, when Congress declares that articles manufactured from iron or steel wire shall pay the rate of duty "imposed upon the wire used in the manufacture of such articles," besides some special additional duty, it intends to take wire in the form in which it is manufactured, whether coated or uncoated, so that the basis is what wire uncoated pays if wire not coated is used, or what wire coated pays if wire coated is used. Independently of the considerations which we will now state, this is the interpretation which, we think, belongs to this paragraph; but we cannot overlook the ruling of the Treasury of September 7, 1900, to which we have already re-

Digitized by Google

ferred, and the unbroken, continuous practice from that time until the present importations were made in the autumn of 1905, which practice was in accordance with the present contention of the importer.

We gave attention to the rule of construction growing out of settled practices of executive departments, a class which seems to have peculiarly just application to customs statutes, in United States v. Proctor, 145 Fed. 126, 132, 76 C. C. A. 96, by an opinion passed down on January 25, 1906. There the circumstances were such that there was no question about its application, and we referred to it in that case only in a general way, and only to some leading authorities. The case at bar, however, is closer, so that we need give the law in this particular a somewhat fuller exposition. By its decision of April 20, 1900, which was within three years from the time the act of 1897 went into effect, the Treasury ruled, as we have shown, in accordance with the present position of the United States. On further consideration, however, in September, 1900, the Department positively ruled in favor of the position taken before us by the importer; and the practice ever since has been in accordance with that revised ruling. Notwithstanding the Department first ruled as it did in April, it cannot be fairly said that the departmental practice has not been uniform; because the prompt revision of the ruling which the Department speedily found to be erroneous can hardly be regarded as creating the lack of such uniformity as the Supreme Court said in United States v. Healey, 160 U. S. 136, 145, 16 Sup. 247, 40 L. Ed. 369, is necessary in order to justify the application of the particular rule we are considering. It can hardly be said that, because at an early day the Treasury made a ruling which it immediately after corrected as erroneous, following ever since a practice in accordance with the correction, this amounts to a lack of uniformity in the proper sense of the expression.

Of course, the length of time over which the practice of the Department extended in this case is shorter than that which has usually accompanied the application of this special rule in the various cases reported; yet, in United States v. Alabama Railroad Company, 142 U. S. 615, 621, 12 Sup. Ct. 306, 35 L. Ed. 1134, the continuance of the practice was only a short time longer than in the case at bar. Nevertheless it was regarded as sufficient to justify the adoption by the court of the practical construction given there by the Postmaster General. The rule seems to be always applied where the statute is really doubtful, and where, also, the departmental construction was practically contemporaneous with its enactment, and continued a considerable length of time, with uniformity. The various elements named in this statement give way, more or less, according to all the circumstances of the case; so that, on the whole, the court may derive assistance from the construction given by the executive officers, though all these elements are not present to their full extent. It is often said in general terms as follows:

"The construction given to the statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." United States v. Moore, 95 U. S. 760, 763, 24 L. Ed. 588.

Digitized by Google

Such expressions as this show that the rule is not a stiff one, and that, as we have said, it has regard to all the circumstances. As to what is a sufficient doubt, Mr. Justice Miller, speaking in behalf of the court in Peabody v. Stark, 16 Wall. 240, 243, 21 L. Ed. 311, says:

"In the absence of a clear conviction on the part of the members of the court on either side of the proposition in which all can freely unite, we incline to adopt the uniform ruling of the office of the Internal Revenue Commissioner."

Returning again to United States v. Alabama Railroad Company, supra, at page 621 of 142 U. S., at page 308 of 12 Sup. Ct., 35 L. Ed. 1134, the opinion observes that the court will "look with disfavor upon any sudden change whereby parties who have contracted with the government upon the faith of such construction may be prejudiced." This has particular application to importers who purchase goods abroad, expecting to market them at home, on the faith of a continuous practice of the Treasury in administering the statutes. This was peculiarly illustrated in United States v. Proctor, supra, where it was shown that the contemplated change on the part of the United States relative to the rate of duty there involved would have resulted in a practical confiscation of importations, which the importer was justified by the preceding practice in assuming would yield a reasonable business profit. In the same direction the opinion passed down in behalf of the court in United States v. Finnell, 185 U. S. 236, 244, 22 Sup. Ct. 633, 636, 46 L. Ed. 890, said that, if a construction acted upon by accounting officers for many years should be overthrown, "we apprehend that much confusion might arise." This was followed by a repetition of what we have already cited from United States v. Alabama Railroad Co., that "the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons."

Of course, we cannot hold that the United States is estopped by the conduct of its executive officers in the technical sense of that expression; but we are reminded in United States v. Finnell, just cited, at page 244 of 185 U. S., at page 636 of 22 Sup. Ct., 46 L. Ed. 890, that Congress can enact legislation to change any existing practice if it deems that course conducive to public interests. We are also reminded by what we have quoted from United States v. Alabama Railroad Company, at page 621 of 142 U. S., at page 308 of 12 Sup. Ct., 35 L. Ed. 1134, that the equities are such that, under all the circumstances, we should apply the particular rule of construction which we are discussing. Therefore we hold that the duty to be imposed is as now maintained by the importer—that is, the duty as assessed less two-tenths of one cent per pound, leaving a duty of 2 cents per pound plus 1¼ cents per pound—in accordance with paragraph 137 of the customs act of 1897.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions for further proceedings in accordance with our opinion passed down this day.

Digitized by Google

(153 Fed. 74.)

ACME FOOD CO. et al. v. MEIER.

(Circuit Court of Appeals, Sixth Circuit. April 13, 1907.)

No. 1,626.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—SOLVENCY.

Solvency at the time of the filing of a petition in involuntary bankruptcy is important as a defense only when the act of bankruptcy charged is the conveyance, transfer, or concealment of property with intent to hinder, delay, or defraud creditors, under Bankr. Act July 1, 1898, § 3 (1), c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]. If the act of bankruptcy charged is the giving or permitting of a preference under subdivisions 2 or 3, insolvency must have existed at the time of the preference and solvency or insolvency at the time of the filing of the petition can only have a reflex importance as evidence.

2. SAME—SOLVENCY—VALUE OF PROPERTY CONVEYED.

Where conveyances of property by an alleged bankrupt are charged as acts of bankruptcy, under both subdivisions 1 and 2 of section 3, Bankr. Act July 1, 1898, c. 541, 30 Stat 546 [U. S. Comp. St. 1901, p. 3422], as made with intent to defraud and also as preferences, the value of the property thus conveyed is not to be computed in determining the question of solvency at the time of the filing of the petition as a defense under the first subdivision, but, if the conveyances are found not to have been fraudulent, the value of such property is to be considered in determining the question of solvency or insolvency when the conveyances were made under subdivision 2.

3. SAME—FRAUDULENT CONVEYANCE—EVIDENCE.

Bona fide conveyances intended only to secure indebtedness or to secure the grantees as sureties of the grantor do not constitute acts of bankruptcy under Bankruptcy Act July 1, 1898, § 3 (1), c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], and where such conveyances, made by warranty deed, are charged as fraudulent under said subdivision, and also as preferences under subdivision 2, it is competent for the defendant to show by parol that they were given merely as security both for the purpose of showing the absence of a fraudulent intent, and also that the value of the property may be considered on the question of insolvency in determining whether or not the conveyances were preferential; and it is immaterial that the issues are tried to a jury.

4. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—VIOLATION OF RULES.

An assignment of error, which, in violation of the rules of the court, includes different parts of a charge to the jury, cannot, after being held not well taken as to one part, be sustained as to another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3034, 3035.]

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This was a petition by plaintiffs in error to have the defendant in error adjudicated a bankrupt. The averments of the petition were, in substance, that the defendant, Charles H. Meier, is insolvent, and that within four months next preceding the date of this petition he had committed an act of bankruptcy.

(1) By conveying on December 30, 1904, by warranty deed to one Mary Losh an interest in a parcel of land described as in the township of Chesterfield, county of Macomb, Mich.

(2) By conveying by warranty deed of November 29, 1904, another interest in land to John Losh situated in same township and county.

(3) By conveying on November 29, 1904, by warranty deed to William D. Parker two village lots in New Baltimore, Macomb, county, Mich.

With reference to these conveyances it is alleged that each was made "with

Digitized by Google

intent to hinder, delay, and defraud his creditors," and that the said Meier by executing same "did transfer, while insolvent, a portion of his property to one of his creditors with intent to prefer such creditor over his other creditors, and for the purpose of defrauding your petitioners of their just claims."

(4) A further act of bankruptcy is charged, in that the defendant on November 22, 1904, did execute a mortgage to the Citizens' Savings Bank for $1,000 on a certain interest in land in the same county of Macomb. This is not charged to have been for the purpose of defrauding his creditors, but that it was made when insolvent and with intent to prefer the bank over his other creditors.

(5) There is then added an omnibus charge "of different and other unjust transfers and payments to other creditors which constitute preferences, but of the nature and times of which said transfers and preferences your petitioners are not aware."

He answered by denying insolvency as charged in the petition, and also denied that any of the conveyances described constituted an act of bankruptcy as charged. He denied that the debts claimed to be due to the petitioners were valid subsisting claims, and gave their origin with particularity. The answer concluded by a demand for a jury to "try the commission of the alleged acts of bankruptcy and the fact of insolvency" and "to try the questions of fact as to the various fraudulent acts and doings of the said petitioners, and any and all matters contained in said petition and in this plea and answer. * * *"

The petitioners joined issue and a jury was sworn, who, upon all the evidence, returned a general verdict of not guilty. Thereupon the court denied an adjudication of bankruptcy, and dismissed the petition. A bill of exceptions was allowed and errors assigned, and this writ sued out.

A. H. Covert and J. J. Jackson, for plaintiff in error.

Martin Crocker and F. C. Miller, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. There was no evidence tending to support the alleged preference by the mortgage to the Citizens' Savings Bank. That mortgage was made for a present consideration and in good faith, and no question has been made by counsel here as to that transaction.

2. Neither is it insisted that the conveyance to Mrs. Mary Losh was either fraudulent or a preference. Counsel before the jury substantially conceded this. Neither is it contended that the conveyance to William D. Parker was a preference. Meier owed nothing to Parker, and the conveyance to him was to protect him as surety upon certain loans which Meier desired to make.

3. One of the issues submitted to the jury was as to whether the petitioners were creditors of Meier. There was evidence tending to show that the larger part of the debt claimed by them originated in the sale of territorial rights for the sale of "Acme Food." The defense was that the food was a humbug, and the contract of sale obtained through fraud and misrepresentation. Meier seems to have been ignorant and credulous, and claimed strenuously that he did not know he was giving notes or entering into any arrangement other than a mere agency. Against this defense there was much positive evidence sustaining the good faith of the contract and the value of the "Acme Food." While the general finding may have been upon the ground that petitioners had not shown a good and

Digitized by Google

valid debt, we have no right to so assume, in view of the conflicting evidence. We allude to this only because counsel seem to be of opinion that, if the verdict could be sustained upon this defense, it was unimportant whether error had been committed in the trial of the other issues.

4. Neither can we assume that the verdict was rested upon the illegality of the contract, because made by a corporation of another state and within the state of Michigan without having complied with the law of the state requiring the filing of the charter before doing business, nor because the defendant may have been regarded as a farmer and not amenable to such a proceeding. No such question was put in issue, and no instruction was given the jury upon either question.

5. The other issues which were submitted to the jury were, first, whether the conveyances made by Meier, mentioned as acts of bankruptcy in the petition, other than those to Mary Losh and Citizens' Savings Bank, were made with intent to hinder, delay, and defraud the creditors of Meier; and, second, if so, has the defendant shown that when the petition was filed he was solvent, excluding any property so fraudulently conveyed? and, finally, if such conveyances were not fraudulent in law or fact, were they preferences within the meaning of the bankrupt law? After instructing the jury that it was "an act of bankruptcy for any person to convey any part of his property with intent to delay, hinder, or defraud his creditors or any of them," the court then said that by another provision of the law the defendant might establish as a defense against such an act of bankruptcy his solvency when the petition was filed. Upon this aspect of the case, assuming the fraudulent character of the conveyances to have been shown, the court said to the jury:

"With regard to the burden of proof in this matter as to solvency: The burden of proof is upon the respondent. That is to say, if a conveyance is made with the intent to hinder, delay, and defraud the creditors, if the aggregate of his property, exclusive of that conveyance, was sufficient to meet his indebtedness, then the petition, the law says, must be dismissed, because the man has not cheated his creditors, and they cannot complain of the transfer, so long as there remain in his hands to be reached by the processes of the law sufficient to pay his debts, therefore, if he had such an amount of property, the petition should be dismissed, because he was solvent."

By subdivision 1 of section 3 of the bankrupt act, of July 1, 1898 (30 Stat. 546, c. 541 [U. S. Comp. St. 1901, p. 3422]), it is made an act of bankruptcy when a person has "conveyed, transferred, concealed or removed or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them."

In Lansing Boiler Works v. Ryerson, 63 C. C. A. 253, 128 Fed. 701, Judge Severens, speaking for this court, said, that:

"The language of subsection 1 of section 3 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words."

Digitized by Google

By subsection "c" of section 3 of the bankrupt act, it is declared that:

"It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed. * * *"

Insolvency, as defined in the act, exists "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

From these provisions of the law two things are plain: First, that in making out this defense of solvency to avoid the consequences of a conveyance made in bad faith, the property thus conveyed shall not be computed in the determination of whether the aggregate of the defendant's property at the time of the filing of the petition against him was, at a fair valuation, sufficient in amount to pay his debts; second, if the jury cannot on the evidence find such conveyance had been made with intent to defraud that all of the property of the debtor, incumbered or free, is to be taken into account in determining the question of solvency or insolvency under the second and third subdivisions of the same section. In short, solvency when the petition was filed is important only as a defense to an act of bankruptcy under subdivision 1 of section 3, and the burden of showing this is on the defendant. 2 Loveland, Bankruptcy, §§ 67, 83; West v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. If the act of bankruptcy be the giving of a preference under subdivision 2, or the permitting of a preference through a legal proceeding under subdivision 3 of the same section, there must be a state of insolvency at the time of the preference and solvency or insolvency at the time of the filing of the petition can only have a reflex importance, if any. West v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098; Loveland, Bankruptcy, § 83; In re Rome Planing Mill, 96 Fed. 813. This distinction the court below had in mind and distinctly told the jury that:

"If a conveyance is made with the intent to hinder, delay, and defraud the creditors, if the aggregate of his property, exclusive of that conveyance, was sufficient to meet his indebtedness, then the petition, the law says, shall be dismissed, because the man has not cheated his creditors, and they cannot complain of the transfer, so long as there remains in his hands to be reached by the process of the law sufficient to pay his debts."

Not one of the several requests of plaintiff in error for special charges in relation to the effect of solvency or insolvency was rightly framed.

Request No. 2 is, in substance, that if they should find that the conveyances mentioned in the petition were made "with intent to prefer" John Losh over petitioning creditors, and the defendant was insolvent "at the time of the filing of the said petition, your verdict should be for petitioners." As this request was based alone upon the claim that they were preferences and not mala fide, the fact of solvency at the time of filing the petition was unimportant if the de-

Digitized by Google

fendant was solvent when he made the alleged preferential conveyance. Request No. 4 is to the effect that if the jury should find the conveyances mentioned were made with intent to hinder, delay, and defraud, etc., "and if you believe that at the time of said transfers the defendant was insolvent, you should find for petitioners." This would be to deprive the defendant of the defense of solvency at the time the petition was filed against him.

The fifth request is placed upon the erroneous assumption that insolvency at the time of the filing of the petition affords the test as to whether a conveyance within four months was a preference.

The sixth request was in these words:

"Sixth. I charge you further with reference to ascertaining whether or not the defendant was insolvent at the time of the filing of this petition that, in determining the solvency or insolvency, you are not to take into consideration the 40 acres of land which defendant transferred to John Losh under date of November 29, 1904, and that you are not to take into consideration defendant's interest in the 20 acres of land transferred by defendant with other grantors to Mary Losh December 30, 1904, and that you are not to take into consideration the two village lots in New Baltimore, Mich., transferred by this defendant to William D. Parker November 29, 1904, and you are not to take into consideration the personal property transferred by bill of sale of defendant to Harry Meier under date of December 1, 1904, but, in order to believe that the defendant was solvent on the 18th of March, 1905, you must believe that defendant had sufficient property to pay all of said petitioners' debts, together with all other obligations which defendant has admitted that he owed at the time of filing of said petition without taking into consideration any of the property above referred to, notwithstanding the fact that debtor claims to now own real estate and the personal property above referred to."

The conveyance to John Losh was by warranty deed. "On consideration of one dollar and other good and valuable considerations." So, also, was the deed to William D. Parker. The bill of sale to Harry Meier was of certain chattels, and was filed and recorded as a chattel mortgage. Its execution is not averred to be an act of bankruptcy in the petition. There could be no adjudication of bankruptcy for an act of bankruptcy not averred in the petition. Loveland, Bankruptcy, § 69.

The fact of such a bill of sale as that referred to could only be looked to as reflecting upon the intent with which other conveyances, contemporary in time, were made, and as evidence upon the question of solvency or insolvency when the petition was filed against the defendant or when the alleged preferences were given under subdivisions 2 and 3 of the third section. The request includes also a conveyance to Mary Losh made December 30, 1904. The answer denied that this was a conveyance made mala fide or in preference, and set up that the defendant and his two sisters owned a small parcel of land, and that Mary Losh bought this land outright and the defendant joined in the conveyance, the consideration being $1,000, one-third of which was paid to defendant for his undivided interest. There was no evidence whatever tending to support the charge that this was a sale for the purpose of hindering or defrauding creditors, and the counsel upon the hearing below conceded that no preference was thereby given Mary Losh; she not being a creditor. It was therefore proper that the value of this interest so conveyed to Mary Losh should

Digitized by Google

not be taken into consideration upon any issue of solvency, and, if the request had been limited to that interest, it should have been given. If the conveyance of John Losh and William D. Parker were bona fide conveyances, intended only to secure indebtedness to them or to secure them as securities for the grantor, their execution was not an act of bankruptcy under subdivision 1 of section 3 of the act. See Lansing Boiler Works v. Ryerson, already cited. But the contention was and is that, as they purported to be deeds conveying the fee, it was not open to the defendant in this case to show that they were intended as mere securities. This objection is made upon the contention that only in a court of equity is parol evidence admissible to convert a deed into a mortgage. But we think that upon two grounds it was admissible to show the real purpose and intent of these deeds: First, upon the issue that the intent was to hinder, delay, or defraud his creditors we think it was admissible to show the real intent; second, upon the issue that these conveyances were intended as preferences and therefore acts of bankruptcy under subdivision 2 of section 3 of the act it was admissible to show that these deeds were intended only as securities and the value of the equity of redemption at the date of each such conveyance. In Lansing Boiler Works v. Ryerson, cited above, we held that the interest of a mortgagor might be taken into account in determining whether when the mortgage was made insolvency existed so as to constitute the security a preference. We see no reason for applying any mere technical rule of the common law to a bankruptcy proceeding upon either the issue of actual common-law fraud or solvency at the time of the giving of a deed intended only as a security. Under such issues no relief is sought against such conveyance. The grantee is not a party, and is not bound by the conclusion. But, when petitioning creditors seek an adjudication of bankruptcy based upon the averment that such deeds were either made with intent to hinder and delay creditors, or with intent to give a preference forbidden by the bankrupt act, we think it should be open to the defendant to show the actual facts and intent of the acts claimed to be acts of bankruptcy. Nothing is better settled under the decisions of the Supreme Court of the United States, as well as of the State of Michigan, than that a deed may by oral or written evidence be shown to have been intended by the parties as a mere security. Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775; Jackson v. Lawrence, 117 U. S. 679, 6 Sup. Ct. 915, 29 L. Ed. 1024. It is true that both these were cases in equity. But the powers exercised by a bankrupt court combine those of a court of law and a court of equity. Section 2 of the act of 1898, which converts the district courts into courts of bankruptcy, provides that such courts "are hereby vested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings," etc. If the question of the commission of an alleged act of bankruptcy involves intent in the execution of an instrument, or the solvency or insolvency of the defendant at the time of an alleged preference, or at the time of the filing of the petition against him, when the defense is solvency, there is no reason for saying that any evidence which would be admissible in any court having jurisdic-

Digitized by Google

tion to give relief to the grantor against a deed by showing that it was intended only as a mortgage or security shall not be admissible. If one has given a deed where the clear intent and agreement was that the deed should operate only as a mortgage, or if no debt was due and the established purpose was to indemnify the conveyee in a contemplated security, there remains in the grantor an equitable right of redemption. Any creditor of such a grantor, or any vendee, assignee, or trustee in bankruptcy would be clothed with the right to show by evidence, written or oral, the real character of the transaction, and be entitled to all the grantor's remedies under such a state of facts. 3 Pom. Eq. Jurisp. § 1196. Why, then, shall the alleged bankrupt be cut off from the right, in a proceeding to adjudge him a bankrupt, to show by the same kind of evidence the character of the transaction for the purpose of showing the absence of mala fides, or that he has an interest of value to be taken into account upon the question of solvency when the security was given? Neither is there any sound reason for saying that the effect of calling for a jury to try the issues in respect to the alleged acts of bankruptcy operates to circumscribe the powers of the court to those technically belonging to a court of law. It is true that error upon such a trial by jury can be reviewed only by a writ of error. But that is because the act confers as a privilege the right of jury trial and such a trial can only be reviewed according to the course of the common law. Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200. But in the case under consideration the only defense against the charge of an act of bankruptcy by making a deed which at common law was mala fide is that the deed was made in good faith, and intended as a mere security. Against the charge that these same conveyances were intended as illegal preferences, the only defense is that, in fact, they were mere securities, and that defendant was solvent when they were made if his equity of redemption be valued as part of his property. In such a case to give the defendant the right of trial by jury, and then deny the right to show the actual character of the conveyances, would be to give and deny the right of jury trial by the same provision of law.

There was no error in denying the sixth request. This also disposes of the exceptions taken to the admission of evidence, and the exceptions to the charge of the court in instructing the jury that it was open to the defendant to show the real purpose and intent with which the conveyances in question were made.

The court, in substance, told the jury that upon the question as to whether these conveyances constituted a preference they might estimate the value of the defendant's equity in the property so conveyed, as well as that not conveyed, and that, if the aggregate of both was enough to pay all his debts, they should upon this point find for the defendant. This part of the charge must be construed as necessarily resting upon the assumption that the jury should find that these conveyances were not mala fide, he having already instructed the jury that the defense of solvency at the time of filing of the petition must be made out exclusive of property so conveyed. Thus construed, there was no error in directing the jury to estimate the value of the equity,

Digitized by Google

of redemption in determining solvency at the date of each such conveyance. We know of no authority which will justify the exclusion of equitable interests belonging to a debtor when we come to the question of his solvency or insolvency in a bankrupt proceeding. The only exclusion authorized by section 1, cl. 15, is of property "which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors." If, then, these conveyances were found not to be such as described by this provision, and therefore not acts of bankruptcy under subdivision 1 of section 3, the grantor's equity of redemption constituted a part of his property and should be estimated as its "fair value" in the aggregate of his property at the time of each said conveyance attached as a preference.

The thirty-sixth exception to the charge was to this language of the court:

> "The testimony of Mr. Meier is that these conveyances, although in the form of warranty deeds, were intended by way of security, and there is no testimony to the contrary except the deeds themselves."

But in assigning error they have included in one assignment (assignment No. 7) this and so much of the charge as dealt with the question of estimating the value of the defendant's equity of redemption in determining solvency or insolvency at date of the conveyance. The eleventh rule (90 Fed. cxlvi, 31 C. C. A. cxlvi) of this court requires that each error intended to be assigned shall be separately and particularly set out, and, when it is to the charge, the assignment shall set out the part referred to totidem verbis. We have already ruled that this assignment, so far as it covers the question last alluded to, is not well taken. We cannot sustain a single assignment as partly good and partly bad without violating our rules. But, aside from this, the court was substantially right in saying that the testimony of Meier upon this point was uncontradicted. When the court undertook to state the evidence, it was the duty of counsel to call attention to evidence overlooked, if important, and give the court an opportunity of correcting the statement. This was not done. We see no sufficient reason for noticing this as "a plain error not assigned," which under strong circumstances the court at its option may do under Rule 11.

All of the errors assigned have been examined. None of them are well taken, and the judgment will be affirmed.

(153 Fed. 81.)

BOARD OF COM'RS OF HERTFORD COUNTY, N. C., v. TOME et al.

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907.)

No. 683.

1. JUDGMENT—CONSTRUCTION—ENFORCEMENT.

Where judgments rendered on certain railroad aid bonds issued by a township contained orders making it the duty of the county commissioners of the county in which the township was located to annually levy a necessary tax to make the annual interest payments on the bonds, but

Digitized by Google

such judgments did not direct the clerk to thereafter issue writs of mandamus if defaults should occur in the levy of the tax, they did not contain process within themselves for their own enforcement, so that, on the board's default, it was necessary for the owner of the judgments to obtain orders of the court to compel performance.

2. SAME—ESTOPPEL.

Where judgments on certain township railroad aid bonds had become dormant by the lapse of three years, without process to enforce the same, and therefore required an order of court entered on notice to revive the judgments and authorize enforcement by mandamus, as provided by Revisal, N. C. 1905, § 620, the defendants on such an application were not estopped by the judgments to question the validity of the act under which the bonds were issued.

3. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISION—OBLIGATION OF CONTRACT—IMPAIRMENT.

Where certain township railroad aid bonds were issued under a state statute, and passed into the hands of non-resident holders for value at a time when the highest court of the state had rendered no decision intimating that a provision of the Constitution of the state would be subsequently so construed as to invalidate the bond act, the federal courts sitting within such state were not bound by such a decision holding that the bond act was illegally passed, the effect of which was to impair the obligation of the contract existing between the township and the bondholders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 950, 957.

Conclusiveness of judgment between federal and state courts, see note to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank of Memphis v. City of Memphis, 49 C. C. A. 468.]

In Error to the Circuit Court of the United States for the Eastern District of North Carolina, at Raleigh.

James H. Shepherd (Shepherd & Shepherd and Winborne & Lawrence, on the brief), for plaintiff in error.

F. H. Busbee (F. H. Busbee & Son, R. T. Gray, P. E. Tome, and E. J. Best, on the briefs), for defendants in error.

Before GOFF, Circuit Judge, and BRAWLEY and McDOWELL, District Judges.

McDOWELL, District Judge. By act of the Legislature of North Carolina (chapter 365, p. 640, Acts 1887) the Murfreesboro Railroad Company was incorporated and Murfreesboro township of Hertford county, which was by section 30 of the act created a "body politic and corporate" (the county commissioners being by said section made the corporate agents of the township), was authorized to subscribe to the stock of the said railroad company and to issue bonds in the payment of the subscription. This statute, so far as is now material, does not differ essentially from the statute under consideration by this court in Board of Com'rs v. Tollman, 145 Fed. 753, 76 C. C. A. 317. An election was held under the act of 1887, and the subscription was authorized. In 1888 the bonds, which are dated September 19, 1887, were issued to the railroad company. The bonds are each for $1,000, numbered consecutively from 1 to 25. The first bond is made to become due ten years after February 1, 1888, and each successive bond one year later. On each bond were coupons, for $60 each, payable annually.

Digitized by Google

On August 5, 1891, Jacob Tome became the purchaser of all the bonds and of all the coupons not then due. The coupons falling due February 1, 1892 and 1893, were not paid. In November, 1893, the said Tome instituted an action in the United States Circuit Court for the Eastern District of North Carolina. To this action the only defendant named is the township of Murfreesboro. The relief sought was judgment that the plaintiff recover of the township the amount of the said coupons with interest and costs, and that the board of commissioners of Hertford county be required by mandamus to levy taxes and pay the said coupons, and also to thereafter annually levy such taxes and pay the coupons subsequently to become due. On May 3, 1894, the township appeared by counsel and answered the complaint. On November 29, 1895, the township filed a second answer, in which the defendant pleaded the fact that by chapter 23, p. 31, Private Acts 1895, the Legislature of North Carolina had "abolished the charter of the defendant." Somewhat later the complainant appears to have filed an amended complaint, which does not appear in the record, making the board of commissioners of Hertford county also a defendant. An answer to this amended complaint was filed December 18, 1896. It should here be stated that the act of 1895 referred to repealed the essential sections of chapter 365, p. 640, Acts 1887—including section 30, which made the board of commissioners the corporate agents of the township. The result of this action was a judgment in 1897 in accordance with the prayer of the original complaint. In 1898 the executors, under the will of said Jacob Tome, instituted another action in the said court on account of the subsequent default in payment of coupons, in which the township and the board of commissioners and the individuals constituting such board were made the parties defendant. On this complaint an order similar to the one above mentioned was made December 21, 1898. Commencing in 1898, and continuing until late in 1902, some considerable payments were made on the coupons. On December 20, 1902, the opinion of the Supreme Court of North Carolina in Debnam v. Chitty, 131 N. C. 657, 43 S. E. 3, was announced. In this opinion chapter 365, p. 640, Acts 1887, was held to have been invalidly enacted. Since the publication of that opinion the executors appear to have been unable to obtain further payments on their coupons. In May, 1905, the affidavit of one of the said executors setting out the fact that the two former judgments had been rendered, and that the then overdue coupons had not been fully paid, was filed in the aforesaid trial court. Thereupon the said court issued a rule to show cause why a peremptory writ of mandamus should not issue. The said affidavit and the said rule are both entitled, "Executors of Jacob Tome, Dec'd, v. Murfreesboro Township." The rule appears to have been served only upon the board of commissioners. An answer was filed to the rule on June 5, 1905, by the board of commissioners "appearing specially." The lower court on January 10, 1906, entered an order reviving the above-mentioned judgments of 1897 and 1898, and ordering the issue of a writ of peremptory mandamus directed to the board of commissioners, and in other respects following the judgments and

Digitized by Google

orders previously made by said court. The mandamus ordered by the judgment of January 10, 1906, was issued May 7, 1906. Thereafter an assignment of errors was filed in behalf of the township, a bill of exceptions was settled and signed, and a writ of error was allowed. On November 21, 1906, the Supreme Court of North Carolina handed down its opinion in Board v. Wachovia Loan & Trust Co., 55 S. E. 442, in which the ruling in Debnam v. Chitty, supra, in regard to the validity of the statute there in question, is expressly repudiated. This fact was not known at the time this case was argued here.

The first matter to which our attention is required arises from the contention that the judgments of 1897 and 1898 estop the plaintiff in error from raising any question as to the validity of the act of 1887, under which the bonds here involved were issued. We are unable to perceive that these judgments "contain process within themselves," or that any reason exists which discriminates the case at bar in this respect from Brownsville v. Loague, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. Ed. 780. The judgments did not direct the clerk of the trial court to thereafter issue writs of mandamus if defaults in the annual payments of the coupons should occur. Clearly for a failure or refusal of the board to levy a tax in 1900, for instance, the coupon holder had to have an order of some description from the court to obtain relief. Although the judgments of 1897 and 1898 contained orders making it the duty of the board to annually levy the necessary tax, yet, on a subsequent failure of the board to obey such orders, some action by the court was necessary to enforce compliance with the previous orders. Whether the necessary action might be process for contempt or another writ of mandamus is immaterial. The fact remains that the judgments are not of themselves sufficient.

Section 620, Revisal 1905 (of the North Carolina laws), reads:

"After the lapse of three years from the entry of judgment on the judgment docket, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent or nonresident, or can not be found to make such service, in which case such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or by other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. But the leave shall not be necessary when execution has been issued on the judgment within the three years next preceding the suing for execution, and return thereof unsatisfied in whole or in part."

The last of the two judgments mentioned was rendered December 21, 1898. The affidavit on which was commenced the proceeding now under review was filed more than three years later. By force of the statute above quoted the judgments sought to be revived were dormant. The writ of mandamus applied for in 1905 is essentially, in the case at bar, a process in the nature of an execution. The statute in question is in effect a statute of limitation, and the trial court was bound by it. Ross v. Duval, 13 Pet. 45, 48, et seq., 10 L. Ed. 51. In other words, the plaintiffs below had to take the steps they did take. They necessarily filed the affidavit, had notice given the judgment debtor, and moved the court to revive the dormant judgments and issue, in essence and effect, process of execution, not contained in the judgments

Digitized by Google

of 1887 and 1898. The decision in Brownsville v. Loague, supra, controls us. The result is that the plaintiff in error was not and is not estopped by the judgments of 1897 and 1898 to question the validity of the act of 1887.

Still another reason exists for holding that the board of commissioners, in behalf of the taxpayers of the township, were and are at liberty to assail the validity of the act of 1887. As has been stated, the Legislature in 1895 annulled the powers of the board to act as the agents of the township. The service of the rule to show cause in 1905 was made only on the chairman of the board. While we doubt the strict legality of this service of process (Revisal 1905, § 440; 1 Code 1883, p. 81, § 217), we shall not pause to discuss this question. The only service of process and the only appearance, that being special, was on and by the board. If the repealing act of 1895 was a valid exercise of a power vested in the Legislature, the township has suffered a judgment without due process of law, and without having had its day in court. It is said, of course, that the act of 1895 is invalid because it impaired the obligation of a contract. But we cannot so decide unless and until we decide that the act of 1887 was validly enacted, for otherwise there was no valid contract which was impaired by the act of 1895.

We must next consider the effect we should give to the recent decision of the Supreme Court of North Carolina in the case of Board v. Wachovia Co., supra. It may be that this court, notwithstanding the Wachovia opinion, is constrained to discuss and independently decide the validity of chapter 365, Acts 1887. But, without expressing an opinion on this question, we think reasons exist making it improper to avoid the discussion which follows. Very frequently it is proper for a court to avoid expressing an opinion on a question not necessarily involved in disposing of the case before the court. And in the case at bar it may be thought that this court could most properly dispose of this case by merely affirming the trial court's ruling with a citation to the Wachovia Case. Such course would leave open a question of grave importance to many litigants and members of the bar in North Carolina. Does this court affirm merely because the view expressed by the North Carolina court coincides with our own view reached independently, or because we consider that this court is bound by the construction put by the North Carolina court on the constitutional provision as to the method of enacting taxing statutes?

Without saying that this court must in all cases relieve litigants and counsel of such embarrassment, we think that there is a reason in this particular case which would render it improper to fail to express and to discuss the reason why we affirm the judgment of the trial court. This reason is as follows: In the case of Tollman v. Board, 145 Fed. 753, 763, 764, 76 C. C. A. 317 (owing chiefly to the fact that certain language, to be hereinafter quoted, used in the opinion in Great Southern Hotel Co. v. Jones, 193 U. S. 546, 24 Sup. Ct. 5, 76, 48 L. Ed. 778, escaped the attention of the writer), we apparently showed less than the respect we feel for the opinion of one of the learned members of the Supreme Court of the United States. A question of great importance was in the Tollman opinion passed over without any consider-

Digitized by Google

able discussion, and, for reasons which will hereinafter appear, this omission may create a false impression. The respect we entertain for the learned Justice in question impels us to now state fully the reasons which led us to the conclusion reached in the Tollman Case, and which now lead us to affirm the judgment of the trial court in the case at bar.

As has already appeared, the Tollman Case presented a question identical with the question now before us. Unless that opinion is erroneous, we must in the case at bar affirm the judgment below, for we are unable to distinguish the two cases. The one point in which the cases differ is this: In the Tollman Case the alleged invalidity of the statute under which the bonds were issued was attacked under the principle laid down in the case of Debnam v. Chitty, supra. Here the attack is based on the fact that in Debnam v. Chitty the Supreme Court of North Carolina held the particular statute under which the bonds involved were issued not to have been enacted as is required by article 2 section 14 of the Constitution of North Carolina. The nature of the supposed defect will appear from either the opinion in the Tollman Case or in Debnam v. Chitty.

No reason suggests itself to us why the difference mentioned should discriminate the two cases. If the ruling of this court in the Tollman Case was sound, we are unable to perceive why the principle there invoked does not apply here. The bonds here involved were issued in 1888, the decision in Debnam v. Chitty was rendered in 1902. Prior to 1899 (Smathers v. Com'rs, 125 N. C. 480, 34 S. E. 554), so far as we have discovered, there had been no opinion of the Supreme Court of North Carolina which so much as intimated that the Constitution would ever receive the construction subsequently put upon it in Debnam v. Chitty. If the doctrine laid down in the long line of cases preceding and following Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, is correctly understood, such doctrine applies here as clearly as in a case where the erroneous state ruling is made concerning some other statute. That there is no peculiar effect to be given to a state court's decision concerning the particular statute which happens to be invoked in the federal court seems to us to necessarily follow from Carroll County v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; Folsom v. Ninety-Six, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278; Stanley County v. Coler, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126; Great Southern Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778.

However, the chief argument made in behalf of plaintiff in error is based on this proposition: A decision by a state court of last resort to the effect that a legislative act was not validly enacted is binding in the federal court; although such decision is regarded by the federal court as an erroneous construction of the state Constitution; although such decision was rendered after rights based on the validity of such legislative enactment had accrued; and although such decision had not been foreshadowed or indicated by any previous decision of the state court antedating the accrual of such rights, if there had been no previous state court decision holding or indicating that the legislative act was a validly enacted law.

Digitized by Google

In the opinion of Mr. Justice Harlan in Wilkes County v. Coler, 180 U. S. 506, 519, 21 Sup. Ct. 458, 463, 45 L. Ed. 642, the following language is used:

"Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose."

In the opinion, written by the same learned member of the court, in Great Southern Hotel Co. v. Jones, 193 U. S. 532, 546, 24 Sup. Ct. 576, 579, 48 L. Ed. 778, the following language is used:

"The only exception to the general rule announced in the above cases [Carroll County v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; Anderson v. Santa Anna, 116 U. S. 356, 365, 6 Sup. Ct. 413, 29 L. Ed. 633; Pleasant Township v. Ætna Co., 138 U. S. 67, 72, 11 Sup. Ct. 215, 34 L. Ed. 864; Folsom v. Ninety-Six, 159 U. S. 611, 627, 16 Sup. Ct. 174, 40 L. Ed. 278; Barnum v. Okolona, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495] arises when the question is whether a particular statute was passed by the legislature in the manner prescribed by the state constitution so as to become a law of the state. Town of South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154; Post v. Supervisors, 105 U. S. 667, 26 L. Ed. 1204; Wilkes County v. Coler, 180 U. S. 506, 520, 21 Sup. Ct. 458, 45 L. Ed. 642."

The question now presented is whether or not the expressions above quoted should be regarded by us as a binding opinion enunciating a doctrine of law, or as obiter dicta. Perhaps no rule is better settled, or more frequently inculcated by the Supreme Court, than that expressions found in opinions of courts which relate to a doctrine of law not necessarily in issue in the case then before the court are not to be regarded as deliberate and binding enunciations of such doctrines. Carroll v. Carroll's Lessee, 16 How. 275, 287, 14 L. Ed. 936. It is probable that there is no volume of the Supreme Court Reports in which the idea is not advanced that expressions of opinion not necessary to the determination of the case are to be regarded as dicta. We think it safe to say that every judge in writing opinions occasionally uses expressions which relate to points not necessarily in issue, and which do not represent either his own or his associates' studied and deliberate views. We feel, therefore, constrained to consider, first, if the expressions above quoted state views that are binding upon this court, and, if not, if they be such as we should follow.

In Wilkes County v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 643, the Supreme Court had under consideration article 2, § 14, of the North Carolina Constitution, which forbids the enactment of a law allowing a county to impose a tax unless, inter alia, the yeas and nays on the second and third readings are entered in the journals. The opinion (page 513 of 180 U. S., page 460 of 21 Sup. Ct. [45 L. Ed. 642]) states that the journals of the two houses were put in evidence, and that it did not appear therefrom that the yeas and nays on the second and third readings of the Acts of 1868, 1879, and 1881, respectively, were entered on the legislative journals. It follows therefore, as an independent proposition, that these acts were not validly enacted. In other words, the state court rulings, subsequent to the issue of the bonds, holding these statutes to have been invalidly enacted, were necessarily considered by the United States Supreme Court proper constructions of the constitutional provision. Again, in the

Digitized by Google

opinion it is stated that the decision of the Supreme Court of North Carolina in State v. Patterson, 98 N. C. 660, 4 S. E. 350, was rendered before the issue of the bonds in question, and it is said:

> "After the decision in State v. Patterson * * * it might have been anticipated that the same court would hold as they did in the subsequent cases above cited that the entering of the yea and nay vote on the second and third readings of an act of the class mentioned in section 14 of article 2 of the state Constitution was a condition precedent that could not be dispensed with under any circumstances."

It seems beyond question, therefore, that the decision of the case before the court did not necessarily involve a distinction between state court rulings, which hold legislative acts to have been invalidly enacted, and state court rulings which hold state statutes to be void for some other supposed constitutional defect. The facts in the case brought it directly under the principle enunciated in many previous opinions, and did not raise a question as to the effect of state court rulings, holding a statute to have been invalidly enacted, made after the accrual of rights, not foreshadowed by state court rulings previously made, and repugnant to the construction which the federal court would independently put on the constitutional provision in question.

Although the language hereinabove quoted from Wilkes County v. Coler, supra, may be deemed an unmistakable enunciation of an opinion, yet, as it was used in regard to a feature of that case not necessarily in issue, most assuredly it could not properly be relied upon as a binding enunciation in such a case as Board v. Tollman, supra. The state court ruling, as to the validity of the enactment of the statute (Debnam v. Chitty), came after the accrual of rights, was not indicated by any ruling previous to the accrual of such rights, and is repugnant to our own construction of the constitutional provision. In Great Southern Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778, there was nothing in issue relating in the remotest degree to the manner of the enactment of the statute. Consequently the expression from that opinion quoted above could not have related to any point in issue there. With great deference, it seems to us to follow from what has been said that we must regard the expressions in question as dicta.

Let us now very briefly examine Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154, and Post v. Supervisors, 105 U. S. 667, 26 L. Ed. 1204. (1) In these cases the state court had, years before the issue of the bonds, unmistakably construed the state constitutional provision as it was construed by the state court decisions rendered after the issue of the bonds. (2) The great subject of debate and the point in the mind of the writer of the majority opinion in the Ottawa Case was the propriety of so applying the doctrine of estoppel as to prevent the defendant below from proving that the act of Legislature was not enacted in the manner required by the state Constitution. It seems to us to follow that there was nothing in that case to make it necessary to decide that a settled course of decision of the courts of a state, long antedating the accrual of rights, is more binding when relating to one provision of the state Constitution than

Digitized by Google

when relating to other provisions of such Constitution. It is true that the language in the Ottawa Case, at page 268, may be read as indicating a belief that such distinction exists. But Mr. Justice Bradley had no reason for drawing such distinction. He was arguing against an alleged estoppel, and everything said by him would have been equally appropriate had the invalidity of the statute there in question arisen from some constitutional defect other than the manner of its enactment. Of Post v. Supervisors, supra, little need be said. It relates to the statute discussed in the Ottawa Case, and arose under the same facts. In the summary of the rulings in the Ottawa Case, as stated in Post v. Supervisors, is the following:

"An act of the Legislature of a state, which has been held by its highest court not to be a statute of the state, because never passed as its Constitution requires, cannot be held by the courts of the United States, upon the same evidence, to be a law of the state."

If this language had been used in a case where the construction given the state Constitution by the state court had been regarded by the United States Supreme Court an erroneous and unwarranted perversion of the state Constitution, and if such construction had been announced (without previous intimation) after the accrual of rights, it would necessarily be decisive of the question we propose to discuss. But in the case then before the federal Supreme Court, the state constitutional provision had been construed by the state court before the issue of the bonds as it was construed after their issue. Hence we do not perceive the propriety of treating the language above quoted as necessarily applicable to the question we are concerned with.

Let us now consider the question on its merits. That the federal court must, in proper cases, construe state constitutional provisions independently will, of course, not be denied. In the opinion in Great Southern Co. v. Jones, 193 U. S. 544, 545, 24 Sup. Ct. 576, 48 L. Ed. 778, are cited numerous Supreme Court cases in which this proposition is stated, and in which it was necessary to decide that this rule is the correct one. As a matter of reason simply, we are unable to perceive the force of the distinction between an erroneous state court ruling that a statute is void because not enacted in the manner required by some provision of the state Constitution, and an erroneous state court ruling that a statute is void because it contravenes some provision of the state Constitution other than that relating to the mere manner of enacting statutes. We find it difficult to see why the clause in a state Constitution which specifies the method of enacting statutes should be given, in the federal courts at least, a more controlling force, or greater effect, than other provisions of the same Constitution. But, even if it be conceded that the manner of enacting statutes is of greater importance than the matter contained in statutes, we conceive that the relative importance of the two classes of constitutional provisions is not the criterion of the power, or of the duty, of the federal courts. The very foundation of the rule under which the federal courts independently construe the ordinary provisions of state Constitutions, and refuse to follow erroneous rulings of the state courts, as we understand it, is the justice and propriety of prevent-

Digitized by Google

ing the courts of a state from retroactively impairing the obligation of contracts. See Rowan v. Runnels, 5 How. 134, 139, 12 L. Ed. 85, in which the effect of a provision of the Constitution of Mississippi was under consideration, and in which Chief Justice Taney said:

"But we ought not to give them [state decisions] a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which in the judgment of this court were lawfully made. If such rule were adopted and the comity due to state decisions pushed to this extent, it is evident that the provision in the Constitution of the United States, which secures to the citizens of another state the right to sue in the courts of the United States, might become useless and nugatory."

We can conceive of no difference in the effect of erroneous state court rulings in impairing the obligation of contracts, whether such ruling be that a statute was not properly enacted or that the statute is in some other respect violative of the state Constitution. If the rules of comity do not forbid the federal courts to repudiate the rulings of the state courts in the one class of cases, we cannot perceive why such rules should have such effect in the other class. If the purpose and intent of the provision in the federal Constitution, which gives to certain citizens of the United States the right to resort to the federal courts, was to furnish to such litigants a shield against sectional or local prejudice, it seems to follow that this purpose and intent must control as fully and as effectually in one class of cases as in the other. If the federal Constitution be supreme, we cannot conceive that an erroneous state court decision retroactively impairing rights can properly be allowed to override its intent, no matter what provision of a state Constitution is the subject of such decision.

We here quote in part some of the language, used in other opinions, which was quoted in the opinion in Great Southern Hotel v. Jones, supra:

From Carroll County v. Smith:

"In the courts of the United States * * * the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts. * * * It was to that very end that the Constitution granted to citizens of one state, suing in another, the choice of resorting to a federal tribunal."

From Burgess v. Seligman:

"As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

In the Tollman Case the validity of the enactment of the statute in question had not been foreclosed by adjudication previous to the accrual of rights. And in that case this court did not desire to be guilty of a "dereliction of duty." As every reason which authorizes a federal court in any case to independently determine the constitutionality of a state statute existed in the Tollman Case, we conceive that there was there no escape from the duty of an independent examination and conclusion.

On the merits we do not regard it as necessary to add to what was

Digitized by Google

said in the Tollman Case. But it should be said that the opinion in Debnam v. Chitty, in the light of the recent opinion in the Wachovia Case, affords a striking illustration of how nearly nugatory the constitutional right of nonresidents to litigate in the federal courts might become, if any class of state court decisions must be given by the federal courts the effect of retroactively impairing contracts which in reality are valid. That the learned Supreme Court of North Carolina, as now constituted, concurs in the view expressed in the Tollman Case in respect to the proper construction of article 2, § 14, of the Constitution of North Carolina, is not only gratifying; but it in no small degree tends to fortify us in the position heretofore taken by this court.

It follows from what has been said that the judgment below must be affirmed. It also follows from what has been said that we affirm because in our judgment, independently exercised, we consider that the judgment below is free from error, and that it was free from error, actual or apparent, when rendered.

Affirmed.

(153 Fed. 91.)

In re TUCKER et al.

TUCKER v. CURTIN.

(Circuit Court of Appeals, First Circuit. October 31, 1906.)

No. 658.

1. JUDGMENT—CONCLUSIVENESS—USE OF TRUST FUNDS BY BANKRUPTS—RIGHT OF BENEFICIARY TO INTERVENE.

A testator directed that a fund should be held in trust, the income to be paid to a granddaughter during her life, and appointed his son and grandson "executors and trustees" under the will. They qualified as executors, but not as trustees, and took possession of the trust property. They were also partners in business, and as such borrowed from themselves as executors or trustees a portion of the trust property. To secure the loan they attempted to transfer certain property to themselves as trustees, but on their subsequent adjudication as bankrupts such property was taken into possession by their trustee in bankruptcy. To his application to sell the property they objected on behalf of the beneficiary under the will; but their objection was overruled, and a sale ordered, but without prejudice to a new petition for an accounting if the beneficiary, "or those who properly represent her," should be so advised. Such a petition was filed by the bankrupts in her behalf, and was denied, after a hearing on the merits. Subsequently the beneficiary herself filed a petition for leave to intervene, which was denied on the grounds of laches and that the prior adjudication was conclusive. *Held*, that the petitioner, being a minor, was not chargeable with laches, and that the bankrupts, even if considered formal trustees, stood in such peculiar relation to the transactions involved that they were not persons who could "properly represent" her, for which reason she was not concluded by the adjudication on their petition.

2. SAME—POWERS OF COURT—SETTING ASIDE PRIOR ORDERS.

The rule relating to the powers of ordinary judicial tribunals, limiting summary proceedings to the term at which judgment is entered, does not apply to proceedings in bankruptcy, in which the court may, at any time before the close of the proceedings, set aside orders previously made.

Petition to Revise Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy.

For former opinion, see 148 Fed. 929, 78 C. C. A. 557.

Digitized by Google

Harold Williams, Jr., for petitioner.
Robert K. Dickerman, for trustee.

Before COLT and PUTNAM, Circuit Judges.

PUTNAM, Circuit Judge. This is a petition by Marion E. Tucker, a minor, by her next friend, to revise certain proceedings in bankruptcy of the District Court for the District of Massachusetts, in which Frederick M. Tucker and Tracy H. Tucker had been duly adjudged bankrupts as copartners under the style of F. M. Tucker & Co. Luther P. Tucker, domiciled in the state of New York, the grandfather of the petitioner, Marion E. Tucker, by his will probated in that state, among other things, bequeathed as follows:

"The other one (1) of said one-quarter parts of said residuary estate, I direct my executors to hold, in trust, and invest the same and pay the income thereof over to my granddaughter Marion E. Tucker, during her natural life, and, upon her decease, leaving lawful issue, to pay over the said one one-quarter part to said issue in equal shares; but in case my said granddaughter shall decease, leaving no issue or descendants of issue her surviving, and her father the said Frederick M. Tucker shall survive her, then and in such event I direct that said one one-quarter part be paid over to him the said Frederick M. Tucker; or, in case said Frederick M. Tucker be not living, then to my grandson Tracy H. Tucker; or, if said Tracy H. Tucker also be deceased, to his issue."

It will be noticed that this bequest makes no provision specifically for trustees, but by its terms it leaves this one-fourth part of the residuary estate in the hands of the executors to carry out the purpose of the will in that respect. The will, however, subsequently speaks of trustees as follows:

"As to the portions of my estate provided to be held in trust, I authorize my executors and trustees to retain existing investments made by me prior to my death, so far as the same shall be practicable, unless there shall be such a change in conditions as shall, in the right discretion of my said executors and trustees, make a change of investment desirable."

Also as follows:

"I hereby authorize and empower my said executors and trustees to sell and convey any or all property, real or personal, of which I may die seised or possessed, and upon the sale thereof to execute, acknowledge and deliver all proper instruments of conveyance and transfer, under seal or otherwise, necessary in law for vesting of title in the purchase or purchasers."

Also as follows:

"I hereby nominate and appoint my son Frederick M. Tucker, and my grandson, Tracy H. Tucker, executors and trustees under this my last will and testament; and I direct that neither shall be required to give bonds as executors or trustees hereunder. I hereby direct that the trusts herein created shall be maintained and carried to the completion thereof by my said executors and trustees, or, in case only one of them shall qualify, by the one so qualifying, or, in the event of the death of one of them, by the other surviving, or, in case both of them shall fail to qualify or shall decease, by a successor (either individual or a trust company) duly appointed by a court having jurisdiction."

The executors named, one of whom was the son of the testator and the other one his grandson, are the bankrupts in this proceeding. Neither of them qualified especially as trustee, nor did any other

Digitized by Google

person. Frederick M. Tucker and Tracy H. Tucker having taken their several oaths as executors on the 11th day of April, 1901, the will was probated by a surrogate in the state of New York on the 12th day of the same April, and letters testamentary issued thereon to them as executors. All that was done with reference to the establishment of any trust, as shown by the record, was as follows:

"The said quarter part so provided to be held by said executors in trust for Marion E. Tucker, who is the daughter of said Frederick M. Tucker, amounted at the outset to about the sum of sixty-two thousand nine hundred fifty dollars, and same consisted of stocks, bonds, promissory notes, securities and cash; said executors never applied for or were appointed trustees under said will, but acted as such under their appointment as executors in the way and manner especially set forth and directed in said will."

For the purposes of this petition, we are bound to assume that the allegations made by the petitioner, Marion E. Tucker, are true. Therefore we assume that specific securities were set apart and earmarked as appertaining to the trust which the will proposed to establish in her interest. We also assume that part of the assets so set apart and earmarked were transferred to the bankrupts as hereinafter set out. Therefore it follows that the petitioner, Marion E. Tucker, has such an equity as a present or expectant beneficiary as entitles her to recognition by the chancellor, and as would give her, therefore, a standing in the courts of chancery, and an analogous standing in these proceedings, unless some specific reason is shown to the contrary by the trustee in bankruptcy. Among such reasons might be the unquestioned qualification of some person or persons to perform the trust under the will, provided such person or persons also stood in such relations to the property in litigation as to fully and unquestionably enable them to protect the interests of the cestui que trust.

There is in the record a petition, to which we will hereinafter again refer, filed by Frederick M. Tucker and Tracy H. Tucker on July 4, 1904, which contained the following allegations:

"On November 18, 1902, said Frederick M., being in need of money, borrowed from the assets of said trust estate so held for Marion E. Tucker, the following property, to wit: 50 shares of the National Elevator stock, 26 shares of American Sugar stock, common, five $1,000 bonds of the Chesapeake & Ohio Railroad, three $1,000 bonds of the Norfolk & Western Railroad, and $5,000 cash, all of the value of about ———; that a portion of said property was delivered to him on that day, and the remainder on November 19, 1902, or soon thereafter; that on said November 18th said Frederick M., being then the owner and holder of a seat in the Boston Stock Exchange, so called, located in said Boston, assigned and conveyed to the said Frederick M. and said Tracy H. Tucker, in their capacity as trustees for said Marion E., said seat, together with all membership rights in the said stock exchange going with or belonging to said seat, a copy of said conveyance and assignment being hereto annexed, marked 'A'; that said conveyance was in fact made and delivered as security for the due return of all said property on demand or repayment of its value to said trustees; that said Frederick M., on receiving said property, transferred it to said firm of F. M. Tucker & Co., which firm used it in its business as stockbrokers, and no part of same has ever been returned or any portion repaid, but same is all still due and owing to said trustees and trust estate held for said Marion E."

It is also claimed, as appears by the record before us, that afterwards, fearing that the seat in the Boston Stock Exchange would not

Digitized by Google

prove to be sufficient security, the bankrupts undertook to add thereto $55,000 of the bonds of the Quincy Granite Quarries Company. These assets, including both the Boston Stock Exchange seat and the bonds of the Quincy Granite Quarries Company, were, in the eyes of the law, in the possession and use of the bankrupts when the petition in bankruptcy was filed. There was no outstanding interest, except as security, in the way in which we have described; and this did not affect the legal possession or use until some action had been taken in the way of foreclosing the rights of the pledgors, nothing of which kind had occurred. Nevertheless, on the trustee in bankruptcy applying on September 1, 1903, for an order for the sale of the same, Frederick M. Tucker and Tracy H. Tucker, acting apparently for the interests under the will, objected for reasons which we need not state; and their objections were overruled. The sale was ordered, without prejudice to an accounting with reference to the proceeds thereof.

The terms of this order require particular attention, because they reserve the right to intervene to Marion E. Tucker alone, in the following language:

> "But without prejudice to a new petition for a complete accounting, if Marion E. Tucker, or those who properly represent her, are advised to bring one."

At this time, so far as the record is concerned, she was the only person who had any present interest with reference to this bequest in the will of her grandfather, and there was no one living who could claim the estate subject to the trust for her during her natural life; so that, aside from the trustees under the will, if there were any, or, perhaps, the executors, until there were trustees, the only person who could represent this interest was the petitioner, Marion E. Tucker. Therefore we again call attention to the peculiar and appropriate fact that it was the personal intervention of Marion E. Tucker, or of some one who could "properly represent" her, which was protected. Nevertheless, afterwards, on July 7, 1904, Frederick M. Tucker and Tracy H. Tucker filed a petition in the District Court, setting out alleged facts substantially as we have described, and praying for an accounting and payment to the testate estate of the amount due for the securities alleged to have been borrowed from the assets thereof. It was signed by Frederick M. Tucker and Tracy H. Tucker individually, but the opinion of the learned judge of the District Court described it as made by them "as trustees under the Tucker will for the benefit of Marion E. Tucker." It has been assumed all through that the last-named petition was filed by the persons who signed it in some official capacity, and for this hearing it must be accepted as such. It appears that, on a hearing on the merits, it was denied. Subsequently Marion E. Tucker, by prochein ami, filed a petition in the District Court for leave to intervene with reference to the subject-matter of the disposition, in the manner we have described, of the assets of the testator. That petition prayed that the petitioner might be allowed to intervene for the purpose of contesting jurisdiction. It was denied for two reasons; one, that the merits had been determined on

Digitized by Google

the petition of July 7, 1904. The other related to laches on the part of Marion E. Tucker. Inasmuch as she was an infant, we are unable to perceive how she can be barred by any delay or laches of any kind shown by the record. This is common learning, of which In re Hogton, L. R. 18 Eq. (1874) 573, is a striking illustration. We should add, however, that we understand from the record that the proceeds of the sale, or sales, have not been in any way distributed, and that they are still in the control of the court in bankruptcy.

The petition before us is technically defective, in that it fails to state the facts on which the case turns as we have stated them, except in a merely inferential manner. The proceedings may also be defective, in that the petition of Marion E. Tucker to the District Court for leave to intervene contained no express prayer, except that she might do so for the purpose of contesting the jurisdiction of that court, as to which the law is clearly against the petitioner. In re Union Trust Company, 122 Fed. 937;[1] Mason v. Wolkowich, 150 Fed. 699. Nevertheless the case is submitted to us without objection in the manner we have already stated, raising the issue whether the petitioner Marion E. Tucker was entitled to intervene in the District Court for the purpose of protecting her alleged interest in the proceeds of the securities disposed of by the trustee in bankruptcy; and therefore, notwithstanding the unsatisfactory condition of the record in the particulars we have explained, we accept that issue.

It is not necessary to point out that the petitions to intervene related to alleged immediate and several rights in the fund in question, and that therefore, unlike interventions by bondholders and stockholders who are represented by trustees or by corporations, which interventions may or may not, ordinarily, be permitted according to the sound discretion of the court, the questions of intervention here were questions of strict law. Consequently, the right of somebody to intervene and to be heard on the merits cannot be disputed. The propositions of the learned judge of the District Court involved a finding that Frederick M. Tucker and Tracy H. Tucker, in their representative capacity, properly intervened, and that, there having been a hearing on the merits on their intervention, the topic was foreclosed. On the other hand, it is claimed by Marion E. Tucker that, as these two gentlemen had never qualified as trustees, they had no authority to intervene, and their intervention was ineffectual; so that she, as representing a fixed equitable interest under the will, in the absence of any duly qualified trustee, was entitled to intervene in her own behalf, and in behalf of whomsoever might be interested under the trust to which her desired intervention related. This proposition of law is correct, unless, as found by the District Court, there had already been an effectual intervention on which the rights of the parties had been determined.

In some states it cannot be doubted that, where a duty is imposed on the executors without any clear establishment of a separate trust, the executors perform that duty, either as technical trustees or quasi trustees, without separate qualification; and in other states the law is otherwise. So far as concerns the law of New York, which is peculiarly applicable to this case, decisions of the Court of Appeals are

[1] 59 C. C. A. 461.

Digitized by Google

cited pro and con as conclusive each way. In view of the contradictory expressions which we quote from the will, first imposing the duty of working out the trust on the executors eo nomine, and afterwards speaking in the same breath of executors and trustees, it may well be doubted whether any of those decisions are strictly in point, and whether the effect of the will in this respect is not a matter of doubt. We do not, however, find it necessary to determine these questions. Neither do we find it necessary to determine whether the rule which admits executors or testamentary trustees into certain federal courts, and particularly certain courts located in the District of Columbia, including the Supreme Court, from whatever jurisdictions such executors or trustees may have received their appointments, enables executors or trustees qualified by a surrogate of the state of New York to intervene effectually in proceedings in bankruptcy in the district of Massachusetts. The circumstances shown by this record are so peculiar that we are not required to enter upon any such general considerations.

The petitioners, Frederick M. Tucker and Tracy H. Tucker, in the petition filed on July 7, 1904, following the order of May 3, 1904, reserving to Marion E. Tucker, or those who could "properly represent her," the right to proceed further, which petition of July 7, 1904, was denied on September 30, 1905, for the reasons given by the learned judge of the District Court already explained, occupied a peculiar position. They were not only the bankrupts, but they were the executors, or trustees, appointed by the surrogate in the state of New York. They were also the loaners and borrowers of the assets in question, and the pledgors and pledgees thereof; and, in addition thereto, they were clearly tort-feasors in equity, if not in law, in availing themselves of the assets of the estate for their own personal benefit. Therefore they were not suitable parties to represent in equity any interests whatever, except to take such action as they might deem proper to relieve themselves from jeopardy. Marion E. Tucker did not unite in that petition, and thus personally avail herself of any rights under the order of May 3, 1904; and, plainly, Frederick M. Tucker and Tracy H. Tucker, in the peculiar position which they occupied, were in no sense persons who could "properly represent her" in the terms of the same order. This is so plain that we must presume that the court proceeded on the petition filed on July 7, 1904, without its attention being called to the anomalous condition of parties in the respects we have spoken of. Of course, it cannot be said that it was the duty of the judge of any court, even of a judge standing in certain respects in the position of one administering equitable rules, and, therefore, analogous to that of a chancellor, to bear in mind that the interests of an infant are involved, which ought to be independently represented by some person in her behalf, or that it is the duty of such a judge, if the matter comes to his mind, to act of his own volition in that direction. Nevertheless there can be no question that, if the attention of the learned judge of the District Court had been called to the situation presented to us, he would have declined to act on the petition of July 7, 1904, until Marion E. Tucker was

Digitized by Google

properly and independently represented. It seems quite certain that the learned judge who entered the order of May 3, 1904, had in view the necessity of guarding this very point, because the terms of that order are clear and special in that direction. Certainly, however this may be, the proceedings on the petition of July 7, 1904, were not such as the order of May 3d contemplated; and there has been no intervention in accordance with that order by Marion E. Tucker personally, or by any one who could "properly represent her." Therefore, according to the literal terms of that order, the right reserved to her still existed in full force when the petition of May, 1906, filed as of November 27, 1905, now brought before us, was presented to the District Court.

However this may be, there can be no doubt of our right to grant the petition before us. If, notwithstanding the express reservation in the order of May 3d, the proceedings on the petition of Frederick M. Tucker and Tracy H. Tucker of July 7th were in any way effective, they are at least voidable, thus following the analogy of proceedings in equity, which analogy governs courts in bankruptcy in these particulars; so that the order entered on that petition, if not void, could have been avoided by proceedings analogous to a bill of review, or to an original bill as the case may be, filed by the infant, by her next friend or guardian ad litem, or by the guardian of the domicile. The books are full of learning on this point, so that we need only to refer in this connection to White v. Joyce, 158 U. S. 128, 146–149, 15 Sup. Ct. 788, 39 L. Ed. 921. Indeed, in the present case there was no necessity for any formalities whatever. It must be regarded as well settled that the rule relating to the powers of ordinary judicial tribunals, limiting summary proceedings to the term at which judgment is entered, does not apply to proceedings in bankruptcy. In re Worcester County, 102 Fed. 808, 811, 42 C. C. A. 637, decided by us on April 20, 1900; In re Ives, 113 Fed. 911, 913, 51 C. C. A. 541, decided by the Circuit Court of Appeals for the Sixth Circuit on February 10, 1902. Consequently the proceedings on the petition of July 7, 1904, could have been set aside summarily by the District Court on a petition therefor within such a reasonable time that the petitioner could not be, or should not be, charged with laches. We have said that no laches exists here.

Whatever might be our relations to an appeal in the proper sense of the expression, we sit on a petition for review as a court of bankruptcy. Therefore, on this petition, so far as necessary to give full effect to it, we have all the powers of the District Court. Consequently we ought to give complete relief, and therefore we ought to set aside the order of September 30, 1905, which denied the petition of July 7, 1904, vacate the proceedings in reference to that petition, and direct that it be dismissed without prejudice; and we ought further to permit Marion E. Tucker, or some person who "properly represents her," in view of her infancy, to intervene in accordance with the order of May 3, 1904, and as asked for in the petition now before us.

Let there be a decree vacating the order of September 30, 1905, and directing that the petition filed on July 7, 1904, be dismissed with-

Digitized by Google

out prejudice, and further directing that Marion E. Tucker, or some suitable person who can properly represent her, or properly represent her interests under the will of her grandfather, Luther P. Tucker, be permitted to intervene and establish her (or their) claims, if any there be, in accordance with our opinion passed down this day.

(153 Fed. 98.)

In re YOUNGSTROM.

(Circuit Court of Appeals, Eighth Circuit. April 23, 1907.)

No. 45.

1. BANKRUPTCY—PETITION TO REVISE—TIME.

An order of a court of bankruptcy confirming an order of a referee denying a claim of certain exemptions asserted by the bankrupt's wife, not being an order made specially appealable by Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], was reviewable on a petition to revise, presented within the six months generally limited for invoking the appellate jurisdiction of the Circuit Court of Appeals by Act Cong. March 3, 1891, c. 517, § 11, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552].

2. SAME—HOMESTEAD EXEMPTIONS.

Mills' Ann. St. Colo. § 2133, provides that, to entitle any person to the benefit of a homestead exemption, he shall cause the word "homestead" to be entered in the margin of his record title to the same, which entry shall be signed and attested by the clerk and recorder of the county in which the premises are situated, and, if the property belongs to the husband, the entry may be made by the wife and vice versa. *Held*, that where the alleged homestead of a bankrupt had not been so designated on the record, when the bankruptcy petition was filed, at the time of the adjudication or the appointment and qualification of the trustee, the premises were not exempt under the state law, and could not be made exempt under Bankr. Act July 1, 1898, c. 541, §§ 6, 21, 70a, 30 Stat. 548, 552, 565 [U. S. Comp. St. 1901, pp. 3424, 3430, 3452], providing for the vesting of the bankrupt's property in the trustee and for the setting apart of exemptions.

3. SAME—EFFECT OF ADJUDICATION.

On a bankrupt's adjudication, the debtor's entire nonexempt estate is in legal contemplation brought into custodia legis and appropriated to the payment of his debts as effectually as if taken in execution or attachment, subject to the qualification, except as otherwise provided, that the property is appropriated in the same condition and subject to the same equities as when in the possession of the bankrupt.

4. SAME—VESTING OF TITLE—TIME.

On the appointment and qualification of a bankrupt's trustee, the title to the bankrupt's property is vested in him as of the date of the adjudication.

5. SAME—EXEMPTIONS—STOCK IN TRADE.

Mills' Ann. St. Colo. § 2562, exempts to a debtor who is the head of a family stock in trade not exceeding $200 in value, and section 2563 declares that, when the head of a family shall die, desert, or cease to reside with the same, the family shall be entitled to receive all the benefits and privileges conferred on the head of the family residing with the same. *Held*, that where a merchant became a bankrupt and absconded with the intention never to return and deserted his wife, who, with him, had constituted a family, she constituted what remained of the family, and was entitled to the $200 exemption from his stock in trade.

Digitized by Google

Petition for Revision of Proceedings of the District Court of the United States for the District of Colorado, in Bankruptcy.

Theodore H. Thomas (Thornton H. Thomas, on the brief), for petitioner.

Frank L. Grant (Lewis B. Johnson, Edwin A. Van Cise, Henry T. Rogers, Lucius M. Cuthbert, and Daniel B. Ellis, on the brief), for respondent.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This is an original petition for the revision in matter of law of an order of the District Court confirming an order of a referee in bankruptcy denying a claim to certain exemptions asserted by the wife of a bankrupt.

Because it was not presented within 10 days after the making of the order sought to be revised, the respondent has moved to dismiss the petition; his contention being that our jurisdiction, under section 24b, of the bankruptcy act of July 1, 1898 (30 Stat. 553, c. 541 [U. S. Comp. St. 1901, p. 3432]), to revise in matter of law proceedings in bankruptcy can be invoked only within the ten days limited for taking appeals under section 25a. The decisions upon this and correlated questions have not been harmonious (see Act March 2, 1867, c. 176, 14 Stat. 518, 520, §§ 2, 8; Littlefield v. Delaware, etc., Co., Fed. Cas. No. 8,400; Bank v. Cooper, 20 Wall. 171, 177, 22 L. Ed. 273; In re Good, 39 C. C. A. 581, 99 Fed. 389; In re Worcester County, 42 C. C. A. 637, 641, 102 Fed. 808, 812; Steele v. Buel, 44 C. C. A. 287, 104 Fed. 968; In re New York Economical Printing Co., 45 C. C. A. 665, 106 Fed. 839; In re Groetzinger & Sons, 62 C. C. A. 124, 127 Fed. 124; In re Friend, 67 C. C. A. 500, 502, 134 Fed. 778, 780; s. c., 197 U. S. 620, 25 Sup. Ct. 797, 49 L. Ed. 909; In re Holmes, 73 C. C. A. 491, 142 Fed. 391), but, as the order sought to be revised is not one of those made specially appealable by section 25a, and as the petition was presented within the six months generally limited for invoking the appellate jurisdiction of a Circuit Court of Appeals (Act March 3, 1891, c. 517, 26 Stat. 829, § 11 [U. S. Comp. St. 1901, p. 552]), we think the motion to dismiss must be denied (Steele v. Buel, supra; In re Holmes, supra).

One of the exemptions asserted by the petitioner and denied by the order in question was a homestead exemption in certain real property in Colorado. The material portions of the statutes of the state creating such an exemption are as follows (Mills' Ann. St. §§ 2132, 2133, 2134, 2137):

"Sec. 2132. Every householder in the state of Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value the sum of two thousand dollars, exempt from execution and attachment, arising from any debt, contract or civil obligation entered into or incurred after the first day of February, in the year of our Lord one thousand eight hundred and sixty-eight.

"Sec. 2133 (as amended). To entitle any person to the benefit of this act, he shall cause the word 'homestead' to be entered in the margin of his record title to the same, which marginal entry shall be signed by the owner mak-

Digitized by Google

ing such entry and attested by the clerk and recorder of the county in which the premises in question are situated, together with the date and time of day on which said marginal entry is so made; provided, that in case the husband is the owner of said homestead, the wife may cause such entry to be made and recorded, and the signature of the said entry by the wife shall have the same effect as if entered by the husband, the owner of the property. And, in case the wife is the owner of the homestead, and shall fail to make such homestead entry, the husband may cause the homestead entry to be made, and the signature thereof by him shall have the same effect as if the entry had been made by the wife, the owner of the property.

"Sec. 2134. Such homestead shall only be exempt as provided in the first section of this act, while occupied as such by the owner thereof, or his or her family."

"Sec. 2137 (as amended). That nothing in this act shall be construed to prevent the owner and occupier of any homestead from voluntarily mortgaging or otherwise conveying the same; provided, no such mortgage or other conveyance shall be binding against the wife of any married man who may be occupying the premises with him, unless she shall freely and voluntarily, separate and apart from her husband, sign and acknowledge the same, and the officer taking the acknowledgment shall fully apprise her of her rights and the effect of signing the said mortgage or other conveyance; and provided, further, that if the owner of said homestead be the wife of any married man who may be occupying the premises with her, no such mortgage or other conveyance shall be binding against said husband, unless he shall sign and acknowledge said mortgage or other conveyance."

The bankruptcy act invests the courts of bankruptcy with authority to "determine all claims of bankrupts to their exemptions" (section 2, cl. 11); requires the bankrupt to "prepare, make oath to, and file in the court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, * * * and a claim for such exemptions as he may be entitled to" (section 7, cl. 8); directs trustees to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment" (section 47a, cl. 11); provides that "all property of the debtor conveyed, transferred, assigned or incumbered as aforesaid"—that is, "subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them"—"shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors" (section 67e); and also provides:

"Sec. 6. This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

"Sec. 21. * * * (e) A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened."

"Sec. 70. (a) The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall * * * be vested by operation of law

Digitized by Google

with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

So far as it is now material to state them, the facts found by the referee are these: For several years the bankrupt and his family, consisting of himself and his wife, the present petitioner, had occupied the premises in controversy as a home. He was the owner and his title had been duly recorded. Shortly before the filing of the creditor's petition, upon which he was adjudged a bankrupt, he suddenly left the state with the apparent intention of never returning and of deserting his wife. She continued to occupy the premises as a home. Neither he nor his wife caused the word "homestead" to be entered in the margin of his record title until after the time of the filing of the petition in bankruptcy, after he had been adjudged a bankrupt, after the appointment and qualification of the trustee, and after the trustee had caused the premises to be inventoried and appraised and was proceeding to sell them under an order of the court; but before the day fixed for the sale the wife caused such an entry to be made and thereby effectually designated the premises as a homestead, if she could do so at that time. She thereupon presented to the referee a petition, praying that the trustee be directed to set apart the premises as an exempt homestead.

As was said by this court in the case of In re Nye, 66 C. C. A. 139, 133 Fed. 33:

"The express terms of the bankruptcy act are such that it does not affect the allowance to bankrupts of the exemptions which are prescribed by state laws, and does not invest the trustee with the title to property which is exempt. * * * The provisions authorizing bankrupt courts to determine all claims of bankrupts to their exemptions, and directing trustees to set apart the bankrupt's exemptions, * * * disclose no purpose to render the exemptions less beneficial than intended by the state laws, but are in harmony with the purpose of the act, disclosed in other provisions, to make those laws the measure of the extent and nature of the exemptions, as well as of the right to them."

The present case, however, presents the question: At what point of time must the bankrupt be entitled to a particular exemption under the state laws to have it allowed and set apart under the saving and protecting provisions of the bankruptcy act? The answer must, of course, be found in that act. Naturally, it would be expected that this point of time would not be later than the date as of which the general estate of the bankrupt is wrested from his dominion and vested in his trustee for the benefit of the creditors. And such, we think, is actually and plainly the effect of the provisions before set forth. Thus it is declared, in section 6, that the exemptions to be allowed are those prescribed by the state laws in force "at the time of the filing of the petition," and, in section 70a, that, upon his appointment and qualification, the trustee shall be vested, by operation of law, with the title of the bankrupt, "as of the date he was adjudged a bankrupt," to all property, not exempt, which "prior to the filing of the petition" he could by any means have transferred, or which

Digitized by Google

might have been levied upon and sold under judicial process against him. Other provisions strengthen this view, notably the requirement of section 7, cl. 8, that a voluntary bankrupt shall claim his exemptions at the time of filing his petition and that an involuntary bankrupt shall claim them within 10 days after the adjudication, unless further time is granted. Indeed, we think the statute admits of doubt only in respect of whether the right to any claimed exemption is to be determined as of the time of the filing of the petition or as of the time when the debtor was adjudged a bankrupt. That it is to be determined as of the earlier date is suggested by those provisions of section 6, section 7, cl. 8, and section 70a, cl. 5, which make the time of the filing of the petition of special significance, and that it is to be determined as of the later date is suggested by the provision in section 70a that the trustee shall be vested with the title of the bankrupt as of the date he was adjudged a bankrupt. But, as the facts of the present case do not require that we determine this matter, we pass it, observing, first, that the present act differs from that of 1867 in that by section 14 of the latter the trustee became vested with the title of the bankrupt as of the date of the commencement of the proceedings; and, second, that the Circuit Court of Appeals of the Seventh Circuit seems to regard the date when the debtor was adjudged a bankrupt as controlling, as is shown in Re Mayer, 47 C. C. A. 512, 521, 108 Fed. 599, 608, where it was said by Judge Woods:

"The intention of this statute is, without doubt, that the creditors shall have all of the estate of a bankrupt which is not exempt, and that the bankrupt shall have the exemptions allowed by the law of his domicile determined by relation to the date of adjudication."

Although dissenting from the judgment in that case, Judge Jenkins also said (47 C. C. A. 528, 108 Fed. 615):

"The general purpose of the bankruptcy act is that the bankrupt, surrendering his estate not exempt, should be discharged from his debts then existing, and should retain the property exempted and allowed to him by the law of the state of his domicile. The creditors are to have all of the estate not exempt, and must surrender all claims against the bankrupt if he shall receive his discharge. The title to the property thus reserved for the benefit of the creditors is vested in the trustees as of the date he was adjudged a bankrupt. That date is the 'dead line,' separating the past and the future. All that the bankrupt had on that date, except property exempt, goes to his creditors."

We conclude that a claimed exemption otherwise recognized by the state laws, but to which the bankrupt had not become entitled at the time of the filing of the petition or at the time he was adjudged a bankrupt, is not within the saving and protecting clauses of the bankruptcy act, and cannot be allowed or set apart thereunder.

Was the bankrupt or his family entitled to the homestead exemption here asserted at either of these times? The answer must be found in the state statutes before set forth and the decisions of the Supreme Court of the state interpreting them. Repeated decisions of that court are to the effect that the purpose of these statutes is to preserve the home for the family, and, to that end, to protect it from alienation by one spouse without the concurrence of the other, and also from execution or attachment arising from any debt, contract, or civil obligation;

Digitized by Google

that no one is entitled to the protection and benefits of these statutes until the premises are designated as a homestead upon the margin of the record title as prescribed in section 2132, supra; and that this designation is effective only from the time it is made, and has no retrospective operation. Drake v. Root, 2 Colo. 685; Wells v. Caywood, 3 Colo. 487; Barnett v. Knight, 7 Colo. 365, 3 Pac. 747; Jones v. Olson, 17 Colo. App. 144, 67 Pac. 349; Goodwin v. Colorado Mortgage Investment Co., 110 U. S. 1, 5, 3 Sup. Ct. 473, 28 L. Ed. 47. In the last case it was said by Mr. Justice Harlan:

"No one is entitled to the benefits of the foregoing statutory provisions unless the word 'homestead' be entered upon the margin of the recorded title of the premises occupied as a homestead. Such are the express words of the statute, and there is no room left for construction. We are not at liberty to say that the Legislature intended actual notice to creditors of the occupancy of particular premises as a homestead to be equivalent to the entry on the record of title of the word 'homestead.' The requirement that the record of the title shall show that the premises are occupied as a homestead before any person can become entitled to the benefits of the statute is absolute and unconditional."

The premises in controversy were not so designated until after the time of the filing of the petition and after the time when the owner was adjudged a bankrupt, so neither he nor his family was entitled to a homestead exemption therein at either of these times.

The Colorado courts hold that when premises, otherwise within the homestead statutes of the state, are designated as a homestead upon the margin of the record title, after a judgment for the payment of money against the owner has become a general lien upon his realty under a state law, the designation exempts such premises from the subsequent levy of an execution issued upon the judgment (Woodward v. People's National Bank, 2 Colo. App. 369, 31 Pac. 184; Weare v. Johnson, 20 Colo. 363, 38 Pac. 374); and from this it is argued that the wife's designation of the premises in controversy as a homestead was effective, because it was made before they were sold by the trustee to satisfy the claims of the creditors. We cannot accede to the contention for these reasons: In Colorado, as is generally true, a judgment for the payment of money is enforced by execution, and the cases cited hold nothing more than that under the terms of section 2132, supra, an execution cannot be levied upon a homestead which is exempt at the time. This is shown by the following extract from the opinions:

"The homestead is exempt from 'execution or attachment.' The property in question not having been subjected specifically to the judgment lien by the levy of an execution before it was withdrawn as a homestead, it was exempted from the levy of the execution."

It is not material that such a judgment is by statute made a general lien upon the realty of the debtor, for that does not wrest from him the title, or bring the property into custodia legis, or dispense with an execution as the means of subjecting it to the satisfaction of the judgment. But under the bankruptcy act, when a debtor is adjudged a bankrupt, his entire estate, in so far as it is not exempt, is in legal contemplation as effectually brought into custodia legis and appropriated to the payment of his debts as if it were taken in execution or at-

Digitized by Google

tachment, subject only to the qualification that, where the act does not specially provide otherwise, as it does in respect of cases affected by fraud, the estate is brought into custodia legis and appropriated in the same plight and condition that the bankrupt himself held it, and subject to all the equities imposed upon it in his hands (In re Pekin Plow Co., 50 C. C. A. 257, 259, 112 Fed. 308, 310; In re Rodgers, 60 C. C. A. 567, 578, 125 Fed. 169, 180; In re Granite City Bank, 70 C. C. A. 316, 137 Fed. 818; State Bank of Chicago v. Cox, 74 C. C. A. 285, 143 Fed. 91; In re Schermerhorn, 76 C. C. A. 215, 145 Fed. 341; In re Blake [C. C. A.] 150 Fed. 279;[1] Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 46 L. Ed. 405; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Thompson v. Fairbanks, 196 U. S. 516, 526, 25 Sup. Ct. 306, 49 L. Ed. 577; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782); and upon the appointment and qualification of the trustee the title is vested in him, as of the date of such adjudication, quite as effectually as if the debtor had conveyed it to him on that date. Indeed, the bankruptcy proceedings have a further effect, for as was said in respect of the act of 1867 in Bank v. Sherman, 101 U. S. 403, 406, 25 L. Ed. 866:

"The filing of the petition was a caveat to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were ipso facto in abeyance until the final adjudication. If that were in his favor, they revived and were again in full force. If it were against him, they were extinguished as to him, and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, civiliter mortuus. Those who dealt with his property in the interval between the filing of the petition and the final adjudication did so at their peril. They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction. With the intermediate steps they had nothing to do. The time of the filing of the petition and the final result alone concerned them."

And the applicability of what was thus said to the present act was expressed in this way in Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405:

"It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction (Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866); and on adjudication title to the bankrupt's property became vested in the trustee (sections 70, 21c) with actual or constructive possession, and placed in the custody of the bankruptcy court."

True, the effect of this language has been somewhat qualified by the decisions in Hewit v. Berlin Machine Works, Thompson v. Fairbanks, and York Mfg. Co. v. Cassell, supra, but the qualification does not consist in giving effect to proprietary acts of the bankrupt committed after the sequestration of his property, but only to such as were committed prior to the filing of the petition and gave rise to rights in third persons which were valid as between themselves and the bankrupt, and which they were lawfully entitled to assert when the trustee's title accrued, the ruling, as qualified, being that the trustee, in cases unaffected by fraud, takes the property in the same plight and condition that the bankrupt held it, and therefore subject to the rights of such third persons, although a creditor levying an execution or attachment thereon would take it discharged of such rights.

[1] 80 C. C. A. 167.

Digitized by Google

At the time of the filing of the petition and at the time the debtor was adjudged a bankrupt, as also at the time of the appointment and qualification of the trustee, the premises in controversy had not been designated as a homestead. In the absence of such a designation, they were not exempt under the state law. Prior to the filing of the petition the bankrupt had full power to dispose of them, and they could have been levied upon and sold under judicial process against him. They, therefore, came plainly within the terms of section 70a as property which vested in the trustee, by operation of law, upon his appointment and qualification, so the claim to a homestead exemption was rightly denied.

The order sought to be revised also confirmed the denial of a stock in trade exemption of $200 asserted by the wife under the following statutes (Mills' Ann. St. §§ 2562, 2563):

"Sec. 2562. The following property, when owned by any person being the head of a family and residing with the same, shall be exempt from levy and sale upon any execution or writ of attachment, or distress for rent, and such articles of property shall continue exempt while the family of such person are removing from one place of residence to another within this state. * * * Sixth, The tools and implements, or stock in trade, of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business not exceeding two hundred dollars in value.

"Sec. 2563. Whenever in any case the head of a family shall die, desert or cease to reside with the same, the said family shall be entitled to and receive all the benefits and privileges which are in this chapter conferred upon the head of a family residing with the same."

The bankrupt had been a merchant and part of his estate consisted of a stock in trade used and kept for the purpose of carrying on his business, the stock exceeding $200 in value. As before stated, the referee found that shortly before the filing of the petition the bankrupt suddenly left the state with the apparent intention of never returning and of deserting his wife, who with him had constituted the family. The only reason assigned or advanced for the denial of this exemption is that one person, such as the wife here, could not be "the said family" within the meaning of section 2563. It is quite true that a person residing alone is not, generally speaking, a family, but that does not answer the question here presented. Without doubt, there was a family prior to the husband's desertion. Of that family he was the head and so was entitled, under section 2562, to an exemption of $200 in his stock in trade. We think the other section in providing that, whenever the head of a family shall die, desert, or cease to reside with the same, "the said family" shall succeed to the right of exemption, plainly means that this right shall pass to the remaining portion of the family; that is, to the family as it was before, but minus the head, whether what remains be one or several persons. In this view the wife, as the remaining portion of the family, was entitled to this exemption.

The case is remanded to the District Court, with a direction to modify its order to the extent of allowing the exemption in the stock in trade.

Digitized by Google

(153 Fed. 106.)

SOUTHERN RY. CO. v. CARR.

(Circuit Court of Appeals, Fourth Circuit. April 10, 1907.)

No. 682.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—NEGLIGENCE OF MASTER.

Where no injury had ever occurred on account of the eaves of a house projecting slightly over a railroad track for 15 years, the eaves being of a permanent character, and not liable to become impaired by use, the railroad company was not negligent in permitting them to remain in such condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 224–227.]

2. SAME—ASSUMED RISK.

The eaves of a house had slightly projected over a railroad spur track for over 15 years, during which no injury had occurred. There was ample room on top of the cars for a brakeman, in the exercise of ordinary care, to pass along the running board and manipulate the brakes without incurring any danger from the eaves; but plaintiff, though knowing the condition of the eaves, took a position on top of a car with his back toward the house, in which situation he was struck by the eaves, knocked from the car, and injured. *Held*, that the danger was an open and visible one, which plaintiff assumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 556.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

3. SAME—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK.

In an action for injuries to a servant, the court charged that, in determining whether an employé has exempted his employer from liability in any particular case because of alleged contributory negligence or assumed risk, the jury should consider the exigencies of his position and all the circumstances of the particular occasion. *Held*, that such instruction was objectionable for failure to explain the difference between the doctrine of contributory negligence and assumption of risk.

4. SAME—DEFECTIVE APPLIANCES—EVIDENCE.

In an action for injuries to a brakeman, proof that the brakes on a railroad car failed to work at the time plaintiff was injured was not evidence that the same were defective.

5. SAME—DUTIES OF MASTER.

The duty of a master to furnish reasonably safe appliances for servants to work with, and to use ordinary care to keep them in repair, does not make the master an insurer of the safety of the servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 172–174.]

6. SAME—BURDEN OF PROOF.

In an action for injuries to a servant by alleged defective appliances, the burden is on plaintiff to show that the master was negligent either in furnishing the appliances or machinery, or that he did not exercise ordinary care in repairing and inspecting them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 882, 900–905.]

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

C. P. Sanders, for plaintiff in error.

Stanyarne Wilson and J. A. Sawyer, for defendant in error.

Digitized by Google

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

PRITCHARD, Circuit Judge. This is an action at law brought by the defendant in error, Joseph Oliver Carr, by guardian ad litem, to recover damages for personal injuries sustained by him while in the employment of the plaintiff in error on the 12th day of December, 1903, as brakeman or flagman. As brakeman and flagman, it was his duty to stand on freight cars and control and stop the same with hand-brakes. At the time he was injured he was on the top of the cars which were being pushed into a spur track at Hickory, N. C., and was attempting to put on the brakes. Before he succeeded in so doing, the cars ran under the projecting eaves of a house which was erected near the spur track; the eaves striking defendant in error, knocking him to the ground, and injuring him. There was a verdict and judgment for the defendant in error, from which this writ of error was taken.

The testimony shows that the house standing near the side track had been constructed about 15 years before the injury occurred, the eaves of which projected over the track; that during all this time cars had been constantly shoved in on the side track, passing along by the house and under its eaves, with brakemen on the top of the cars; that no one had ever been injured there before or since the accident in question. The evidence also shows that the brakes immediately after the accident were in good order. It also appears that there was ample room on the car for one, by the exercise of ordinary care, to set the brakes without coming in contact with the overhanging eaves. The eaves projected over the top of the car about 18 inches. This defect, if any, was not latent, but patent, and easily observed. The person injured was familiar with the location of the house, track, and overhanging eaves, and while at work on top of the cars had passed along this track by the house quite a number of times. In passing along on this occasion he stood on the side of the car with his back toward the house. It was shown that he failed to look to ascertain whether he was in danger of coming in contact with the eaves of the house, notwithstanding he knew he was in close proximity to the house. While in this position, the car ran under the eaves, and he, being struck by the same, was knocked off and injured. It was shown that there was ample room for him to have stood on the car and set the brakes without coming in contact with the eaves.

It appears from the record that at the conclusion of the testimony in chief on behalf of the defendant in error, and again at the conclusion of all the testimony, the plaintiff in error moved the court to direct a verdict on the following grounds:

"(1) That there is not sufficient evidence of negligence shown on the part of the master.

"(2) That the injury which came to Mr. Carr came from one of the risks assumed by him when he entered the service of plaintiff in error.

"(3) That, if there is any evidence of negligence on the part of the master, the evidence clearly shows contributory negligence on the part of Mr. Carr."

Digitized by Google

The court below refused the motion to direct a verdict, but at the same time stated:

"I am doubtful if the plaintiff has the right to recover in this case. I am inclined to think that this injury was the result of his own negligence; but I think there is a question for the jury, and I will let it go to the jury."

The plaintiff in error excepted to the refusal of the court to direct a verdict, and also excepted to the charge of the court because it did not distinguish between the defense of assumption of risk and that of contributory negligence.

It is a well-settled rule that the master must furnish safe appliances and a reasonably safe place in which to work. The testimony shows that, if he had remained on the running board which is laid along the center of the top of the car, he would not have been injured, or, if he had taken the precaution to have stepped to the opposite side of the running board, he would have been still further removed from the point which he occupied when injured. It is true that he claims the brake was defective, and that he could not successfully operate it on that occasion, but the uncontradicted evidence shows that the brake was in good condition just immediately after the accident occurred.

John White, who was conductor of the switch engine and crew, among other things, testified as follows:

"Q. On this occasion state whether or not a brakeman could have gone through there, if he had been looking, without being struck by those eaves? A. Yes, sir; he could have gone through there without being struck.

"Q. Did you examine the brakes afterwards? A. I got my brakes stake and went up on the cars and examined them to see if they was all right.

"Q. What did you do? A. I put them on.

"Q. Did you put them on, or were they on? A. No, sir; he had them on enough to stop the car. I tried to see if they were sprung, or anything had caught so they would not turn.

"Q. Could you turn it any more? A. Yes, sir.

"Q. What was the condition below? A. Chains were all right, and brake rods all right.

"Q. How was the shoe? A. All right.

"Q. Could a man stand between the brakes and the centerboard and put on brakes, and not come in contact with that? A. Yes, sir; he could stand on that side.

"Q. After these cars were started in there, was it time enough for a man to put on both brakes there? A. Oh, yes, sir; a long time."

E. C. Klinerd, who was at the same time employed as a brakeman, testified, among other things, as follows:

"Q. Did you know anything about the condition of those brakes on those two cars? The conductor examined them?

"(Objected to by Mr. Wilson.)

"Mr. Sanders: Q. Unless you saw him—did you see him examine them? A. He called my attention to it.

"Q. Were you there when he did it? A. Yes, sir.

"Q. What was the condition of those two brakes? A. I could not see anythink wrong about them. I did not try to hold them. I don't know anything about their holding.

"Q. Explain to the jury how they are operated, and what causes them to hold? A. When you wind it, it winds up on the brake. The chain winds up the brake.

"Q. And that throws a pressure against the wheel? A. Yes, sir.

"Q. On this occasion you saw nothing out of order? A. No."

Digitized by Google

Even if the brakes had been defective, there is nothing to show that the master had knowledge of such defect, and, under the circumstances, the master having furnished safe appliances, to wit, brakes that were in good condition, if the same became defective without the knowledge of the master, he could not be held responsible therefor; it appearing that he had in the first instance furnished reasonably safe appliances and had used due diligence to keep the same in a reasonably safe condition, as the evidence shows the master did on this occasion. No injury ever having occurred on account of the projecting eaves during all the time cars had been carried by this point, and the eaves being of a permanent character and not liable to become impaired by use, as in the case of machinery, it must be presumed that the master exercised reasonable care.

Labatt, in his work on Master and Servant (volume 1, § 136), states the rule as follows:

"The true doctrine applicable in this connection seems to be rather this: That the previous safe and successful operation of the instrumentality is conclusive in the master's favor, provided that it appears that he has not been derelict in regard to his duty of active inspection at reasonably sufficient intervals, and no circumstances which would have put a prudent man on inquiry has come to his knowledge."

We have carefully considered all of the evidence offered in the court below, from which it appears, as hereinbefore stated, that the party injured had been in the employment of the plaintiff in error for a considerable length of time, and was thoroughly familiar with his surroundings, and the dangers incident thereto.

In determining whether a reasonably safe place has been furnished the servant in which to work, it is necessary to ascertain the character of the danger which is sought to be avoided. For instance, if a servant is required to work in the open, where he can readily observe the conditions surrounding him, the same degree of caution is not required of the master as in cases where a servant is required to work in a place where he is not afforded the means of comprehending as fully dangers by which he may be confronted.

Thompson on Negligence (volume 4, § 3772), in discussing this phase of the question, says:

"As in other situations, this ordinary or reasonable care, by whatever term it is designated, varies according to the danger to be avoided. For example, the care required of the master, under this rule, in respect to machinery and appliances, is much less where the service required to be performed is on the surface of the earth, in open day, and its character and appliances are simple, than when the machinery used is dangerous and complicated, or the work is performed in a place or at a time when the surrounding dangers are not so obvious."

When the spur track was constructed, the eaves of the house projected over the same, and the cars had been passing thereunder almost daily for 15 years prior to the date of the accident, and no injury had occurred prior to that time, and there was ample room on top of the car for one who exercised ordinary or reasonable care to pass along so as to manipulate the brakes without incurring danger. The injured understood these arrangements perfectly well, and, even if he had not taken particular care in observing how far the eaves extended over the

Digitized by Google

car, it was not the fault of the master. It was the duty of the defendant in error to see a thing which was plain, open and patent.

It is insisted that the court below erred in granting the following request which was offered by the defendant in error. "In determining whether an employé has exempted his employer from liability, in any particular case, because of the alleged contributory negligence or assumption of risk on the part of the employé, the jury should take into consideration the exigencies of his position and all the circumstances of the particular occasion. While regarding his own safety, he should also bear in mind his duty to his employer." Kane v. Railroad Co., 128 U. S. 95, 9 Sup. Ct. 16, 32 L. Ed. 339. It is insisted by the plaintiff in error that the Kane Case, supra, is not analogous to the case at bar, and that the doctrine announced therein does not apply to the facts in this case. In that case the facts were as follows:

"It was in evidence that at midnight, in the month of February, a train of freight cars, belonging to or being operated by the defendant, left Marysville on its line of road, for the city of Baltimore. The rear car was the caboose. The third car from the caboose was an ordinary 'house car.' The fourth one was laden with lumber. The car upon which the plaintiff was required to take position while the train was in motion was about the eighth or tenth one from the caboose. His principal duty was to 'brake' the train from that car back to the caboose. When the train, moving southward, was going into York Haven, 20 miles from Marysville, the plaintiff, while passing over it for the purpose of putting down the brakes, discovered that the third car from the caboose had one step off at the end nearest the engine, and immediately called the attention of the conductor to the fact. The conductor promised to drop that car at the coal yard or junction beyond them in the direction of Baltimore, if, upon looking at his manifest, he found it did not contain perishable freight.

"When the train stopped, about 4 or 5 o'clock in the morning at Coldfelters, some miles north of the coal yard or junction, the plaintiff went to the caboose to eat his breakfast and warm himself. It was snowing, freezing, and sleeting. One of the witnesses testified that 'it was a fearful cold night, raining, and sleeting. * * * It was almost bitter cold. The rain was freezing as it fell—a regular winter's storm.' While the plaintiff was in the caboose eating his breakfast, the train moved off. He immediately started for his post, leaving behind his coat and gloves. Upon reaching the south end of the third car from the caboose, he attempted to let himself down from it in order to reach the next car ahead of him, which was the lumber car, and pass over the latter to the one on which he usually stood while the train was in motion. At the moment he let himself down from the top of the house car, he forgot that one of its steps was missing; and, before realizing the danger of his position, and without being able then to lift himself back to the top of the car, he fell below upon the railroad track and between the wheels of the moving train, causing him to lose both legs. The plaintiff testifies that if, at the moment of letting himself down from the top of the car, he had recalled the fact that one of its steps was gone, he might have pulled himself back with his hands, or have 'slid down' on the brake rod, for he had before climbed up and down by holding that rod with one hand and putting his foot against it and pulling himself up until he touched the running board."

The foregoing statement shows that the knowledge of the defect, to wit, the missing step, was brought to the attention of the conductor who in turn assured the party injured that the car would be dropped at the next station, and, in the absence of information from the conductor to the effect that he had not removed the car, the party injured was justified in assuming that the same had been dropped, and that any car that he might attempt to climb upon would be in a reasonably

Digitized by Google

safe condition. The information he had received from the conductor, taken together with the exigencies of the occasion, were sufficient to relieve the plaintiff from the charge of contributory negligence, as the court very properly held in that case.

In the case of Kane v. Railroad Co., supra, among other things, it was said:

"But it is said that the efficient, proximate cause of the injury to the plaintiff was his use of the defective appliances at the end of the car from which he fell, when he knew, and, at the moment of letting himself down from that car should not have forgotten, as he said he did, that one of its steps was missing. It is undoubtedly the law that the employé is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so. He will be deemed, in such case, to have assumed the risks involved in such heedless exposure of himself to danger. Hough v. R. R. Co. [100 U. S. 224, 25 L. Ed. 612], Dist. of Columbia v. McElligott [117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946], and Goodlett v. Louisville & Nash. R. R. Co. [122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230], above cited; Northern Pac. R. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755."

In submitting the instruction hereinbefore referred to, the court failed to explain to the jury that the rule in regard to contributory negligence was different from the one which pertains to assumption of risk. These two defenses being essentially different, and not depending upon the same principles of law, the granting of this instruction was calculated to confuse the minds of the jury in determining the issues submitted for their consideration. In the case at bar the injuries sustained resulted from dangers that were so open, patent, and obvious that a reasonably prudent man, situated as the injured person was on that occasion, could have avoided the same if he had exercised ordinary care and caution. Therefore the rule announced in the Kane Case, supra, and relied upon as controlling in this case, does not apply.

Even if the brake had been defective, as contended by counsel for defendant in error, it is shown by the evidence that if he had stood on the running board, or near thereto, that he could have avoided all danger; but in utter disregard of dangers that were well known to him, for some unknown reason, he took a position on the car which necessarily brought him in contact with the eaves of the house, and was thereby injured. Under the circumstances it cannot be contended that his injury was in any wise due to the negligence of the plaintiff in error.

It is insisted by defendant in error that the brakes failed to work at the time he was injured. This is not evidence that the same were defective. It is true that the master is required to furnish his employés with reasonably safe appliances with which to work, and to use ordinary care in keeping the same in repair; but the rule does not go to the extent of constituting the master an insurer. If the master negligently fails to perform his duty towards his servants in providing them with reasonably safe appliances with which to work, or fails to inspect such appliances, and injury results therefrom, then he can be held liable for injuries which may be received by his servants by reason of such failure. In an action like the one at bar, the burden

Digitized by Google

is on the plaintiff to show one or the other of these facts. He must either show by competent evidence that the master was negligent in furnishing the appliances or machinery, or that he did not exercise ordinary care in repairing and inspecting the same. These facts must affirmatively appear in order to entitle the plaintiff to recover.

"The mere fact of the accident is not enough to establish negligence. There must be additional and affirmative proof of the particular negligence which caused the accident, and it must also appear that the master had opportunity of previous knowledge." 1 Bail. Mas. & Servt. § 406.

"The presumption is that the master has done his duty by furnishing safe and suitable appliances, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by the further presumption that the master had no notice of the defect, and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the machinery; but it must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises." 1 Bail. Per. Inj. Mas. & Servt. § 365.

The evidence in this case fails to show that the master was negligent in any respect. It was shown by the defendant in error that he undertook to operate the brake, but that it would not hold. Further on in his cross-examination he said, "I wound the chain up tight," which shows that the chain was not broken. Even if in attempting to set the brakes he had broken the chain, this of itself would not have constituted negligence on the part of the master. However, the uncontradicted evidence of the conductor and brakeman is to the effect that immediately after the accident the brake was found in perfect order. Under these circumstances, we do not think that there was sufficient evidence as to the negligence of the defendant company to warrant the submission of the case to the jury.

In the case of Edgens v. Mfg. Co., 69 S. C. 529, 48 S. E. 538, the court, said:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. * * * It is not sufficient for the employé to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was."

The learned judge who tried the case below was evidently impressed with the fact that there was not sufficient legal evidence to entitle the plaintiff to recover, and, in discussing this phase of the question, said:

> "I am doubtful if the plaintiff has the right to recover in this case. I am inclined to think that this injury was the result of his own negligence; but I think there is a question for the jury, and I will let it go to the jury."

While there are a number of exceptions to the charge of the court, at the same time, we do not deem it necessary to consider the same, feeling, as we do, that there is not sufficient legal evidence from which the jury could infer that the injury sustained was the result of the negligence of the defendant in error.

For the reasons herein stated, the judgment of the Circuit Court is

Digitized by Google

reversed, and the case remanded to that court, with instructions to set aside the verdict, award a new trial, and to proceed thereafter in accordance with the views herein expressed.

(153 Fed. 113.)

UNITED STATES v. LARKIN.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1907.)

No. 1,595.

1. CUSTOMS DUTIES—PROCEEDING FOR FORFEITURE OF SMUGGLED GOODS—JURISDICTION.

Jurisdiction of a proceeding for the forfeiture of smuggled goods exists only in the district of seizure, which is the district in which the goods, if on land, are found; a collector cannot, by carrying them into another district and there making the formal seizure, confer jurisdiction of the proceeding on the court in such district.

2. PLEADING—NEGATIVE PREGNANT.

Pleas which are evasive or double are bad, and a negative pregnant is not a good plea for any purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 202-205, 261-263.]

Appeal from the District Court of the United States for the Northern District of Ohio.

This is a proceeding to declare the forfeiture of certain valuable jewelry alleged to have been fraudulently smuggled into the United States, through the port of New York, on June 10, 1902, by one Cassie L. Chadwick. The information contains the usual and requisite averments touching the intentional and fraudulent importation with intent to cheat and defraud the revenue of the United States, and then avers that the property so smuggled had been seized by Charles F. Leach, collector of the Northern District of Ohio, within said district, on May 19, 1905. Adrian H. Larkin, being interested as a claimant, came in and entered his appearance for the sole purpose of denying the jurisdiction of the court below to entertain jurisdiction of any proceeding for the forfeiture of said property. To this plea a demurrer was filed which, upon argument, was overruled. A reply to the plea was then filed, and to this reply the claimant demurred. This demurrer was sustained. The government declined to amend or further plead. The court sustained the plea, and dismissed the information. From this judgment, the United States have appealed, and assigned error.

John J. Sullivan, for the United States.

A. C. Dustin, for defendant.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge (after stating the case). The articles against which this forfeiture proceeding was begun were illegally imported through the port of New York. Subsequently, they were found in the city of New York and in the possession of the claimant as bailee. These jewels had been pledged by the owner and importer, Mrs. Cassie L. Chadwick, to one J. W. Friend, and Friend placed them in the custody of Adrian H. Larkin, as bailee and attorney. Friend, learning that a claim had been made that same had been illegally and surreptitiously imported through the port of New York by the pledgor, visited the Secretary of the Treasury and made disclosure of his

Digitized by Google

possession of same and his rights, and, as averred by the plea, made an agreement with the Secretary that same should be kept in the city of New York, open to the inspection and examination of any official of the department. Friend, not being himself a resident of New York, placed them in the custody of the claimant, with authority to conduct any transactions with the Treasury Department growing out of the claim that same may have been fraudulently imported. At the request of the department, Mr. Leach, collector of the port of Cleveland, went to New York for the purpose of examining the jewelry and determining by inspection whether same had been illegally imported, and whether it was subject to seizure and forfeiture. He accordingly applied to Larkin to be allowed an inspection, and this was permitted. The plea then states that Leach "informed said Larkin that certain of said jewelry had not been wrongfully imported, and that he did not care to make further examination thereof, but that certain of said pieces he was in doubt about, and would like to exhibit them to a person, located in New York City, who was expert in such matters, for his opinion, and asked permission to take said jewelry away from the office of said Larkin for that purpose, he promising and agreeing to return said property to said Larkin, at his office in New York City, on the afternoon of that same day. Thereupon, said Larkin, relying upon said promise and agreement of said Leach, delivered said property into his possession and custody, receiving from said Leach a receipt therefor in writing, a true copy of which is hereto attached and marked "Exhibit A," and made a part hereof.

The receipt referred to is in these words:

"New York, March 14, 1905.

"Received of A. H. Larkin, attorney for J. W. Friend, the following pieces of jewelry, for examination and identification:

"1 Marquise (single stone) diamond ring.
"1 ruby and diamond ring.
"1 diamond ring, about three karats, off color diamond.
"1 ring set with two cabochin rubies and sixteen diamonds.
"2 earrings set with two karat diamond and small pear-shaped diamond pendants.
"1 Marquise (canary) diamond ring.
"1 ring set with diamonds in shape of shield.
"2 empty settings.
"1 ring set with diamond in shape of shield.
"1 ring set with two five-karat diamonds, twelve diamonds in shank.
"1 six-karat diamond (white) ring.
"1 seven-stone pearl ring.
"2 opal stick pins.
"1 chatelaine watch.
"1 brooch (one oval opal) surrounded by eight diamonds and small spr. rubies.
"1 card case set with jewels.

"[Signed] Chas. F. Leach, Collector of Customs."

It is then averred that said Leach, in violation of his agreement, carried same to Cleveland. That from there he returned certain pieces of the lot to Larkin, as not subject to seizure, and seized the remainder at Cleveland, as having been illegally imported, and then caused this proceeding to be instituted in the District Court for the Northern District of Ohio. To this plea the district attorney replied. So far

Digitized by Google

as this relates to the promise or agreement under which the collector received the property here involved, it is in these words:

"That after an examination of the jewelry aforementioned, the said collector informed the said Adrian H. Larkin that he was in doubt as to which specific articles of jewelry and merchandise were unlawfully imported, and that it would be necessary for him to take such articles as to which he was in doubt and further examine them as to whether or not they had been unlawfully imported; and thereupon the said Charles F. Leach received into his care certain of the said articles of jewelry and merchandise, and gave to the said Adrian H. Larkin a receipt for the same, a copy of which is set forth in the plea to the jurisdiction herein filed."

"Plaintiff further says, that it denies that the said Charles F. Leach, collector as aforesaid, promised to the said Adrian H. Larkin that he would immediately return the said articles of jewelry and merchandise which he thus received into his care, and plaintiff further denies that he took said jewelry into his care merely to submit it to an expert in New York for valuation, or that he said to said Larkin, or any other person, that such was his purpose or intention. But plaintiff says that only in the city of Cleveland, Ohio, could the said collector of customs, Charles F. Leach, ascertain which of said articles were unlawfully imported, and that, with consent of the said J. W. Friend, the said Charles F. Leach brought the said articles of jewelry and merchandise to Cleveland, and that he there made a careful investigation and ascertained that certain of the said articles of jewelry and merchandise which he had thus brought from New York were not unlawfully imported, and these articles of jewelry and merchandise he forthwith returned to the said J. H. Larkin, at New York; the remaining articles of jewelry and merchandise—that is to say, those mentioned in the information herein filed—he ascertained were unlawfully imported, and thereupon—that is to say, on the 19th day of May, 1905, in Cleveland, Ohio—he did seize the said articles of jewelry and merchandise mentioned in the said information, and did claim title in the same for the plaintiff, the said United States."

The reply is ambiguous. The averment is that he promised to return the jewelry to the claimant upon the "afternoon" of the day he received it. The reply is a denial that he promised to "immediately return the said articles." It is that form of pleading which is styled a "negative pregnant," an admission that he received same under a promise to return same and a tender of an issue as to whether his promise was to return same immediately. The averment was that he received the jewelry under a statement that he wished to submit same to an expert in the city. The reply is that he did not take it into his custody "merely to submit to an expert in New York for valuation." The question is not whether he entertained a purpose not expressed, but whether he did not promise to return same when he had carried out the purpose for which he had requested possession. The reply is evasive and does not deny the substantial averments of the plea. "The law refuseth double pleading," said Lord Hobart, in Slade v. Drake, Hob. 295, "and negative pregnants, though they be true, because they do inveigle and do not settle judgment upon one point." Stephen on Pleading (Heard's) *381, 382. We quite agree with the court below that under the circumstances of this case, these jewels were not subject to seizure in Cleveland, but should have been seized in the district of New York. The articles were found in the latter district and should have been there seized.

Section 3072, Rev. St. [U. S. Comp. St. 1901, p. 2011], is supposed to confer general authority upon every collector to make seizures of property both within and without his district, if he has ground for

Digitized by Google

believing same subject to seizure. No construction of this section has been found, save that by Judge Benedict, in the case of The Joshua Leviness, 9 Ben. 339, Fed. Cas. No. 7,549, where that learned judge expressed the view that the authority to make seizure without the district is of merchandise found upon a vessel seized under section 3059, Rev. St. [U. S. Comp. St. 1901, p. 2006]. We need express no opinion upon this subject. But there is no authority which authorizes a collector who finds smuggled property in one district to carry it into another for the purpose of changing the situs of seizure and adjudication. Section 3086, Rev. St. [U. S. Comp. St. 1901, p. 2015], provides that when an article is seized it shall be placed "in the custody of the collector or other principal officer of the customs of the district in which the seizure shall be made, to abide adjudication by the proper tribunal. * * *"

The dictrict of seizure is the district in which the suspected article, if merchandise on land, is found. The proper district for an adjudication of forfeiture is the district in which the seizure was made. The Abby, 1 Mason, 360, Fed. Cas. No. 14; Four Packages v. United States, 97 U. S. 404, 24 L. Ed. 1031. These articles were found in the Southern District of New York. If, as now claimed, the collector for the Northern District of Ohio had authority to seize them wherever found, he should have seized them where in fact he found them, and then placed them in the custody of the collector of the port of New York, to hold until adjudication. But he neither seized the jewels, unless his breach of trust in not returning them as he promised to do, be regarded as an official seizure, nor returned them to the possession of the claimant, but carried them to his own district and there went through the form of a seizure. That he took them to his own district in order to determine whether they were subject to seizure, cannot affect the question of jurisdiction. They had been found in New York, and should have been seized there. The fact that evidence important to identify them was in Cleveland, and that it was necessary to carry the jewels to that point for identification, should not, under the circumstances of this case, affect the jurisdiction of seizure and adjudication. When Leach received these jewels, he did so as a collector. So ran his receipt. If he carried them out of the district where they were found for the purpose of identification, he did so in breach of his agreement and should not be suffered to say now that he "found" them in Cleveland and there seized them.

Judgment affirmed.

(153 Fed. 116.)

VICKSBURG WATERWORKS CO. v. MAYOR, ETC., OF CITY OF VICKSBURG.

(Circuit Court of Appeals, Fifth Circuit. April 25, 1907.)

No. 1,641.

APPEAL—FINAL ORDER.

Complainant, having obtained an injunction against the maintenance of certain suits in a state court affecting its water rights and right to cut off service in order to coerce payment of back debts, filed a bill, the object of which was to have defendants made parties to the original bills,

Digitized by Google

and to obtain against them a perpetual injunction restraining further prosecution of certain suits which defendants had brought in a state court for the same purpose. *Held*, that a order modifying a temporary restraining order against defendants, so as to permit them to prosecute their suits in the state court with reference to questions not determined in the prior proceedings, but not determining the cause on the merits nor ordering that the bill or motion be dismissed, was not a final order from which an appeal could be taken.

[Ed. Note.—Finality of judgments and decrees for purposes of review, see note to Brush Electric Co. v. Electric Imp. Co. of San Jose, 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co. et al., 28 C. C. A. 482.]

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

In certain suits, No. 41, and ancillary proceedings thereto, No. 79, of the docket of the Circuit Court, entitled Vicksburg Waterworks Company v. Mayor and Aldermen of the City of Vicksburg, theretofore brought and decided, the last branch of the same being now pending in the Supreme Court of the United States, the Vicksburg Waterworks Company, complainant, filed a so-called motion making new and additional parties defendant, praying for a perpetual injunction and for a rule upon such defendants to show cause why they should not be attached for contempt for the violation of the decrees of the court theretofore rendered and of the injunctions granted in such cases, and for reasons gave a full statement of the previous litigation and the decrees rendered therein. The decree in No. 79 was particularly set forth as follows:

"This cause coming on to be finally heard at this the January term, 1906, of this court, upon the original bill of complaint and the answer of the defendant thereto, and all of the exhibits which are made such, to said original bill of complaint and said answer, and all of the other pleas and proceedings in this cause, together with a certified copy of the charter of the said Vicksburg Waterworks Company, which is filed in the records as evidence in this cause, also the petition of defendant for a modification of the temporary injunction granted in this cause, so that the complainant shall not be authorized to cut off water from its patrons who refuse to pay the rates of complainant, claiming the right to have the injunction modified by virtue of the ordinances of the defendant, fixing water rates; and the motion of complainant to have said injunction granted heretofore made perpetual, and the court having heard the argument of counsel, and being fully advised in the premises, and being satisfied that the complainant is entitled to the relief prayed for in its bill of complaint and for full relief, it is thereupon finally ordered, adjudged and decreed:

"First. That the defendant, the mayor and aldermen of the city of Vicksburg, be and is hereby denied the relief prayed for in its petition, to wit: That the injunction be modified so that the mayor and aldermen of the city of Vicksburg shall not be restrained from enforcing the ordinances passed by them fixing the water rates and prescribing rules and regulations of the Vicksburg Waterworks Company, and that the Vicksburg Waterworks Company shall not be permitted to cut off patrons' water, provided patrons pay the rates fixed in said ordinances.

"Second. That said defendant be and is hereby enjoined from enforcing the said three ordinances described in said bill, to wit: An ordinance entitled 'An ordinance to fix and prescribe maximum rates and charges for water supplied to the inhabitants of the city of Vicksburg whether measured by meters, and for other purposes,' approved the 20th day of April, 1904; an ordinance entitled 'An ordinance to fix and prescribe maximum flat rates and charges for the supply of water to consumers in the city of Vicksburg and for other purposes,' approved the 20th day of April, 1904; and an ordinance entitled 'An ordinance to require waterworks, gas and electric light companies to present bills before charging damages for a failure to pay them when due,' approved the 8th day of December, 1903, so far as the latter relates to complainant.

Digitized by Google

"Third. That the restraining order heretofore granted in this cause on the 11th day of January, 1905, be, and the same is hereby, made perpetual.

"Fourth. That said defendant be, and is hereby, enjoined from in any manner interfering with complainant's contract rights under its said contract with the city of Vicksburg entered into between Samuel R. Bullock & Co. and said city under the ordinances of November 19, 1886.

"Fifth. That the defendant be, and is hereby, enjoined from interfering with the rules and regulations of complainant, the Vicksburg Waterworks Company, and the water rates for the inhabitants of the city of Vicksburg now in force, established by the Vicksburg Waterworks Company.

"Sixth. That said defendant be, and is hereby, enjoined from interfering with the water rater known as 'flat rates,' now in force established by the Vicksburg Waterworks Company.

"It is further ordered, adjudged, and decreed that the defendant pay all costs of this cause.

"Finally ordered, adjudged, and decreed this the 3d day of January, A. D. 1906.

"H. C. Niles, Judge."

Among other things, it was averred:

"Your orator would show that notwithstanding the decree and injunctions of this honorable court, as hereinabove set forth, and notwithstanding that the Supreme Court of the state of Mississippi has decreed that suits of the character of the suits filed by defendants can not be brought in the state courts, and notwithstanding defendants full knowledge of all the proceedings hereinabove set forth, the said defendants, either as complainants, or as attorneys for complainants, as will be hereinafter more particularly stated, have willfully and maliciously filed suits in the chancery court of Warren county, Miss., based on alleged invalidity, illegality, and unreasonableness of various of your petitioner's rates, rules, and regulations and have obtained temporary injunctions, some prohibitory, and some mandatory, restraining your orator from enforcing its rates, rules, and regulations, and especially the cutting off of the water from defendants' premises for nonpayment of back bills, commanding defendant to turn on the water again where it has been cut off because of the nonpayment of past due bills of defendants, thereby willfully, maliciously, and unlawfully committing acts in violation of said decrees and injunctions of this honorable court."

The complaint then proceeds with argumentative averments showing the right of the complainants to enforce its rules and regulations, and how the defendants were in contempt, and the said motion concludes with the following prayer:

"Wherefore, your orator prays that your honorable court grant an order requiring defendants J. C. Bryson, J. B. Dabney, Harris Dickson, A. O. Hardenstein, Mrs. Thos. H. Dickson, T. M. Searles, G. W. Crock, Lizzie Sanguinetti, Annie Sanguinetti, Mary Sanguinetti, Delia Lanceskes, and Lena Youngblood to show cause why they should not be attached for contempt of this court in violating said decrees and injunctions in said suit No. 41, and said suit No. 79, ancillary thereto, and upon the petition of your orator to grant said alias and pluries writs of injunction which were issued on the 2d day of April, 1906, upon petition of your orator, by filing their bills of complaint containing the said contemptuous averments in the chancery court of Warren county, Miss., as aforesaid; and that they and each of them, their agents, servants, and attorneys, be restrained by order of this court from proceeding further in the prosecution of said suits in the chancery court of Warren county, Miss., until this motion for contempts shall have been heard and a final order made herein; and that, upon said final hearing hereof, they and each of them, their agents, servants, and attorneys, may be perpetually restrained from further prosecution of said suits or any of them; and that your orator may be awarded its said damages in the sum of $675 to be paid by said defendants, and such other and further damages as your orator may suffer hereafter in the premises; and that the costs of this proceeding be required to be paid by defendants. And for such other and further relief as the facts may demand, and as in duty bound your orator will ever pray," etc.

Digitized by Google

Upon this motion, the judge made the following order:

"To the Clerk of the Circuit Court of the United States for the Southern District of Mississippi:

"You will issue a restraining order commanding the said defendants in the foregoing motion to refrain from doing any further act in further prosecution of the said suits in the chancery court of Warren county, Miss., which are named in said motion, until the further order of this court. And you will also issue an order commanding said defendants to appear before this court on the first Monday in November, 1906, unless another time and place shall be fixed upon application of said defendants, by order of this court, and show cause, if any, as prayed for in said motion, why they should not be attached for contempt for violating the decrees and injunctions heretofore rendered and issued in said suits in this court entitled 'Vicksburg Waterworks Company v. Mayor and Aldermen of the City of Vicksburg,' No. 41, equity, and said suit known as No. 79 of the same title, ancillary to said No. 41, as set out in said motion.

"Sept. 1st, 1906. H. C. Niles, Judge."

The several respondents filed an answer to the motion, and also a demurrer to the same. The answer is lengthy, and puts at issue many facts alleged in the motion.

The demurrer gave as grounds: First. That it does not appear from the said complaint that the said respondents or any of them were parties to either suit No. 41 or No. 79, equity, the decrees whereof are alleged to have been violated by said parties respondent; second, that the said complaint is otherwise insufficient in law to charge defendants with contempt or any other misdemeanor.

On a day fixed, the matter came on to be heard, and the following decrees were rendered:

"Vicksburg Waterworks Co. v. Mayor and Aldermen of the City of Vicksburg. Nos. 41 and 79, Eq.

"Decree in Contempt Proceedings.

"This day this cause coming on to be heard on petition of complainant and exhibits, and the answer of defendants and exhibits, upon motion to dissolve the restraining order heretofore granted herein, and the court having heard the argument of counsel for the respective parties, and having considered the matter, it is thereupon ordered, adjudged, and decreed that said restraining order be and the same is hereby modified in the following particulars, to wit: The defendants herein shall be permitted to prosecute said suits heretofore filed by them against complainants in the chancery court of Warren county, Miss., in so far as they, and upon the allegations in the several bills contained which, do not contravene and are not in conflict with any of the rates, rules, and regulations of complainant the Vicksburg Waterworks Company, which are made Exhibit A, to its petition herein and heretofore adjudicated by this court to be reasonable. But any other questions contained in said suits, this court does not restrain said defendant from trying in the chancery court of Warren county, or in any other county, or in any other court or county. And the court is further of the opinion that in cases where there is a claim for arrears due on a water bill from the consumer to the waterworks company, and the consumer tenders payment for future services under the rules and regulations of the complainant waterworks company, that the said waterworks company has no legal right to cut off the water of said consumer solely for the purpose of coercing payment for prior service; but the said waterworks company must proceed to collect the past due indebtedness as other debts collected under the law.

"It is therefore ordered, adjudged, and decreed that the said restraining order be modified in accordance with these views, and to that extent dissolved and vacated, and that complainants pay the costs of this proceeding.

"Ordered, adjudged and decreed this the 14th day of November, 1906.

"H. C. Niles, Judge."

Digitized by Google

"Vicksburg Waterworks Co. v. Mayor and Aldermen of the City of Vicksburg. Nos. 41 and 79. Equity.

"The above-styled matter coming on to be heard on the motion of the complainant, the Vicksburg Waterworks Company, to have the defendants J. C. Bryson, J. B. Dabney, Harris Dickson et al. cited to show cause why they should not be punished as and for a contempt, and upon the demurrer of the said defendants to the said motion, and the court, having heard and considered the said motion on the said demurrer, is of the opinion that the said demurrer is well taken, and that the said motion should be dismissed in so far as it charges contempt against the said parties.

"It is therefore ordered, adjudged, and decreed that the said demurrer be sustained, and that said defendants named in said petition be, and they are hereby, purged of contempt by reason of the matters and things set forth and charged in said motion, and that complainant pay the cost of this proceeding.

"Ordered, adjudged, and decreed this the 14th day of November, 1906.

"H. C. Niles, Judge."

From these two decrees the Vicksburg Waterworks Company sued out this appeal, assigning many errors in the same.

Robert L. McLaurin, Amos A. Armistead, and E. L. Brien, for appellant.

J. C. Bryson and Harris Dickson, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the case as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

The appellees move to dismiss this appeal, because neither of the decrees above mentioned is final. At the bar the appellant abandoned the appeal so far as the contempt proceedings are concerned, but insists on the errors assigned as to the first-mentioned decree. Leaving out of consideration the charge of contempt for violation of former decrees, and treating the so-called motion as a bill in equity, the object was to have the respondents made parties defendant in the bills already decreed upon, and to obtain against them a perpetual injunction restraining them from further prosecution of certain suits pending in the chancery court of Warren county, Miss. In the way of passing upon complainant's right to such relief, the Circuit Court issued a temporary restraining order, and thereafter, on a hearing, modified the restraining order. Beyond this modified restraining order, the court has not decided as to the relief the complainant is entitled to, unless it be in the opinion and ruling found in the modifying order, to wit:

"And the court is further of the opinion that in cases where there is a claim for arrears due on a water bill from the consumer to the waterworks company, and the consumer tenders payment for future service under the rules and regulations of complainant waterworks company, the said waterworks company has no legal right to cut off the water of said consumer solely for the purpose of coercing payment for prior service; but the said waterworks company must proceed to collect the past due indebtedness as other debts collected under the law."

It is contended that as the rules and regulations of the complainant, as approved by final decree in the ancillary proceeding No. 79, allowed the cutting off of water from a consumer to coerce payment for prior services, and as the court has, in modifying the restraining

Digitized by Google

order, expressly held to the contrary, the court has finally passed on the merits of the original motion, and the decree is final. To support this contention, the counsel cite French v. Shoemaker, 12 Wall. (U. S.) 86, 20 L. Ed. 270, as follows:

"Objection is made that the decree is not final, because it does not in terms dismiss the cross-bill; but the court is of the opinion that the statement contained in the decree that the equity of the case is with the complainant by necessary implication disposes of the cross-bill as effectually as it does of the answer filed by the appellant to the original bill of complaint. Leave, it is true, is given to either party to apply at the foot of the decree for such further order as may be necessary to the due execution of the same, or as may be required in relation to any matter not finally determined by it: but it is quite apparent that the reservation was superadded to the decree as a precaution, and not because the court did not regard the whole issue between the parties as determined by the decree. Such was doubtless the view of the Chief Justice who passed the decree, as the application for the appeal was made to him at the same term, and was immediately granted without objection."

Again:

"Unquestionably, the whole law of the case before the court was settled by the Chief Justice in that decree, and as nothing remains to be done, unless a new application shall be made at the foot of the decree, the court is of the opinion that the decree is a final one, as it has conclusively settled all the legal rights of the parties involved in the pleadings." Forgay v. Conrad, 6 How. (U. S.) 202, 12 L. Ed. 404; Thomson v. Dean, 7 Wall. (U. S.) 342, 19 L. Ed. 94; Beebe v. Russell, 19 How. (U. S.) 283, 15 L. Ed. 668, supra. Also, section 503, Foster's Fed. Pr.; Am. & Eng. Enc. Pl. & Pr. vol. 2, pp. 66, 72, to like purport.

And counsel say:

"No clearer distinction between an interlocutory or administrative order, and a final decree, can be found, than that given in the above authorities. An examination of the final decree in this cause, on page 666 of the record, shows clearly that the court so understood it to be a final decree, and this is a fact to be considered, for it fixed the rights of the parties as set up in the pleading, and taxed the cost against complainants [appellants here]. As far as the pleadings in this cause went, there was nothing else for the court to decide. The matter was at an end. There was no other report to court to be had, no other facts to hear. The rights of the parties were fully heard and finally adjudicated by this decree, and the complainant was taxed with the cost, as above stated, showing that the court understood that this decree was final on the pleadings presented in this cause."

To all this, we say that the authorities cited, though unquestionably stating correct rules, are not controlling on the facts shown in this record. No matter what the judge may have thought he was deciding, and although he gave a judgment for costs, he did not, in the decree in question, grant or dismiss the motion bringing the defendants into court, and he has left for future decision the main question presented on the motion, i. e., whether the respondents shall be in any wise perpetually restrained from further prosecution of the suits in the chancery court of Warren county, Miss., and pending the decision of that question they are temporarily restrained from such prosecution; true, not to the extent desired by the complainant, because the judge in modifying the original restraining order gave a construction temporary, not final, of certain rules of the company relating to the cutting off of water from nonpaying consumers.

It frequently occurs that all the law of a case is settled by the rul-

Digitized by Google

ing on demurrer; but, unless the ruling is followed by a dismissal of the bill, there is no final decree. Here, the court's ruling goes only to a part of the case, and the bill or motion is not dismissed. The case presented is anomalous, if not unique, involving interesting questions of practice; but as yet no final decree has been rendered, and without a final decree our jurisdiction to review does not attach.

Appeal dismissed.

(153 Fed. 122.)

ATLANTA, K. & N. RY. CO. v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1907.)

No. 1,588.

1. RAILROADS—RIGHT OF WAY—ABANDONMENT —NATURE AND ELEMENTS—INTENT.

A railroad company, which wrongfully obtained and held possession of a right of way for a spur track to reach certain industries which rightfully belonged to another company, is not entitled to retain such possession as against the rightful owner, on the ground of abandonment because of the construction by the latter of a spur track over another route, where it appeared that such construction was necessitated by its inability to obtain possession of the right of way in dispute, and was temporary only, and without any intention to abandon its rights which were in litigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 213-219.

Abandonment or forfeiture of right of way, see note to Townsend v. Michigan Cent. R. Co., 42 C. C. A. 576.]

2. REMOVAL OF CAUSES—JURISDICTIONAL AVERMENTS IN PETITION—FAILURE TO DENY.

Averments of fact in a petition for removal, in the absence of some denial by answer or by comparison with the record, must be taken as admitted, and, if sufficient upon their face to justify a removal, all other questions out of the way, will sustain the jurisdiction of the Circuit Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 166, 189, 195.]

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This is a second appeal; the first being from an interlocutory injunction awarded under the cross-bill upon pleadings, affidavits, and counter affidavits. For a full statement of the issues and our conclusions supporting the jurisdiction of the Circuit Court and the injunction awarded the Southern Railway, we refer to the opinion. 131 Fed. 657, 66 C. C. A. 601. Upon a final hearing below, upon the bill of the Atlanta, Knoxville & Northern Railway Company, and the cross-bill of the Southern Railway Company, and all of the evidence, the disputed right of way was held to belong to the Southern Railway Company. The bill of the Atlanta, Knoxville & Northern Railway Company was dismissed, and the interlocutory injunction granted the Southern Railway Company under its cross-bill was made final. The Atlanta, Knoxville & Northern Railway Company was required to surrender possession and to desist from all interference with the Southern Railway Company's possession. From this decree the Atlanta, Knoxville & Northern Railway Company has appealed.

J. W. Caldwell, for appellant.

Leon Jourolmon, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

Digitized by Google

LURTON, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

This is a litigation between two competing railway companies over the question of priority to a right of way desired by each for the purpose of constructing a spur, whereby certain manufacturing plants on the bank of the Tennessee river, at Knoxville, Tenn., might be served. The steps taken by each to obtain that part of the only direct route are fully stated in the opinion of this court, reported 131 Fed. 666, 66 C. C. A. 601. The former hearing was upon the pleadings and exhibits and a volume of affidavits and counter affidavits. We then held that the Southern Railway Company had obtained the prior right over the land of S. B. Luttrell through priority of contract with the owner, and this conclusion was again reached by the court below upon full evidence. The essential facts of the controversy, as presented by this transcript, are so materially identical with those found in the former as not to demand any further restatement of the case or reconsideration of the conclusions we then reached. The first, second, third, and fourth assignments of error, which alone challenge the conclusion of fact as to the priority of right of the Southern Railway Company, are therefore overruled.

The remaining assignments involve questions not necessarily precluded by the fact of the priority of right found in favor of the appellee company. The first of the questions covered by the assignments of error referred to is that the court erred in requiring the Atlanta, Knoxville & Northern Railway Company to deliver possession of the disputed right of way and desist from interfering with the use and occupation of same by that company. The ground upon which error is predicated is that pending this suit, and while the Southern was excluded from the occupation of the right of way in dispute, it had abandoned this route and constructed its spur upon another and different route, and by this alternate route had reached and was serving the manufacturing plants which it originally purposed to reach by the disputed line. Intervening between the main line of the railway of each of the antagonistic companies, and the lands occupied by the industries negotiating with both for the construction of a spur for their private use, lay a body of land abutting on the Tennessee river owned by Mr. S. B. Luttrell. The industries desiring the spur proposed to furnish the company with which it should first agree a right of way across this Luttrell land. The only direct or feasible way was at the foot of a bluff on this land and along the bank of the river. The industries came first to an agreement with the Southern, and procured from Luttrell a deed to this coveted right of way, a way apparently too narrow to be used by both companies. After the Southern had come to an agreement, and after Luttrell had executed a deed to the Southern of the right of way, and while it was in the hands of a representative of the industries, but unregistered, the Atlanta, Knoxville & Northern Railway Company commenced a condemnation proceeding against Luttrell. Upon the strength of this fact and of a preliminary survey, it put a force of men at work upon this Luttrell right of way. Upon the same day, and perhaps, or almost, simultaneously with the action of the Atlanta, Knoxville & Northern Railway Company,

Digitized by Google

the Southern likewise took possession of part of the same route. At this juncture the present bill was filed in a state chancery court, and an ex parte injunction was allowed excluding the Southern from the disputed route and from interfering with the occupation of the Luttrell right of way by the Atlanta, Knoxville & Northern Railway Company. At a later hour of the same day, a like bill was filed in same court by the Southern Railway Company, and an ex parte injunction obtained stopping the activities of the Atlanta, Knoxville & Northern Railway Company. Some days later the chancellor denied a motion to dissolve the injunction restraining the Southern, but did dissolve the injunction restraining the Atlanta, Knoxville & Northern Railway Company. This action left the Atlanta, Knoxville & Northern Railway Company in possession, and it has since remained in possession, and has constructed a spur track over part of the disputed route under the protection of the interlocutory injunction. The case in which this injunction was allowed was later removed to the Circuit Court of the United States, and at a still later day the injunction dissolved, and an interlocutory injunction awarded the Southern. The decree awarding this was the subject of the first appeal already referred to.

The agreement between the Southern Railway Company and the industries, under which at an expense of several thousand dollars the latter had procured Luttrell to convey to the Southern Railway Company the right of way across his premises, obligated the former to at once construct and operate the proposed switch. When it found itself excluded from this route, it entered into a supplemental agreement, whereby the industries agreed that the railway company might substitute an alternate line. This supplemental agreement recites that it is necessitated by the pending litigation with the Atlanta, Knoxville & Northern Railway Company. The original agreement bore date of June 30, 1903, and this supplemental agreement was made September 1, 1903, and pending this suit. Pursuant to this later arrangement, the Southern Railway Company constructed a spur to certain marble quarries; the spur being about four miles in length. This spur paralleled the route originally projected as far as the location of the contracting industries, but was about 1,000 feet south of that line. From this quarry spur a lateral spur was constructed to reach the industries lying north and on the river. This spur is shown to have been quite inexpedient, as it crossed several traveled streets and roads, and was built in a public street for several hundred feet. The grade was bad, and the spur very expensive to operate, and not so convenient to some of the industries. To obtain the assent of one of the largest of the contracting industries, the appellee agreed to bear certain hauling expenses incident to the substitution of this alternate way "until such time as the Southern may secure control of its original line or arrange to make delivery of logs at the point contemplated in the original contract."

That this "alternate" line, so far as the spur from the quarry line is concerned, was only a temporary expedient resorted to as a consequence of its wrongful exclusion by appellant from the right of way to which it had a deed, is most evident from all the circumstances in the case, including the very significant clause from the supplemental agreement

Digitized by Google

above quoted. It would be a most remarkable result if an expedient to which the conduct of the appellant has driven the appellee should upon mere evidence of the fact, and without any supplemental bill, be held sufficient evidence of an abandonment of the very right of way in litigation and a sufficient reason for denying the relief which the cross-bill plaintiff is otherwise plainly entitled to. The appellant itself is responsible for the nonuser of this right of way up to this time, and has protected its own wrongful possession by the processes of the court erroneously granted. The mere fact that the appellee has constructed a spur into these industries over a longer and more expensive route does not, under the circumstances, amount to serious evidence of an intent to abandon the more direct way from which it has been excluded. Abandonment of a property right is always a question of intention. As to the character of evidence necessary to support a decree based upon abandonment, see the views of this court as expressed by Judge Day, now Justice Day, in Townsend v. Mich. Central R. R. Co., 101 Fed. 757, 761, 42 C. C. A. 570.

The suggestion is advanced that, to dispossess appellant, will give to appellee the only two routes by which these industries can be reached. There is nothing in this. It may often happen that there is but one feasible approach for a private track to serve a particular interest. Nor does it appear that the Atlanta, Knoxville & Northern may not parallel appellee's quarry line and run a spur from such line into these industries, as it forced appellee to do. Whether the Atlanta, Knoxville & Northern Railway Company may, under Acts Tenn. 1899, p. 920, c. 399, condemn the right to jointly use so much of any track the Southern may construct at the foot of Luttrell bluff, as a line through a gap, gorge, or along a cliff, where no other way is practical, is a question which certainly cannot arise now and upon these pleadings. The Atlanta, Knoxville & Northern Railway Company is wrongfully in possession of a right of way to which the Southern has the prior right, under its contracts with the industries and the conveyance from Luttrell. Being wrongfully in occupation of a right of way owned by the Southern, it must surrender that right of way to its rightful owners. Both of the defenses last considered are based upon matter which has arisen pending the litigation, and no supplemental pleading has been filed upon which issues thus arising might be litigated. Bates Eq. Pl. § 638; Foster Eq. Pr. § 187. As the objection was not made below, nor relied upon here, we have decided the questions upon the merits. Kelsey v. Hobby, 16 Pet. 269, 277, 10 L. Ed. 961; Coburn v. Cedar Valley Land Co., 138 U. S. 196, 222, 11 Sup. Ct. 258, 34 L. Ed. 876.

One other question remains, and that pertains to the jurisdiction of the Circuit Court. It is said now that this case was wrongfully removed from the state court because the Knoxville & Augusta Railroad Company was joined with the Southern Railway Company as a defendant. The Atlanta, Knoxville & Northern Railway Company was a corporation of the state of Georgia; the Southern, a corporation of the state of Virginia. It is now said that the Knoxville & Augusta was a corporation of the state of Tennessee, and that it did not and could not join with the Southern in the petition to remove. This question has never before been mooted, and nothing was said upon this subject in

Digitized by Google

our former opinion, when the question of jurisdiction was threshed out upon wholly different matters. The reason why this ground for objecting to the jurisdiction was not earlier made seems to be found in the fact that the Knoxville & Augusta Railroad Company is a defunct corporation, whose railroad was long since sold to the Southern Railway Company, and has since been operated by the latter corporation. This fact was stated in the petition for removal, and the existence of any such corporation as the Knoxville & Augusta Railroad Company denied. That petition further averred that the complainant had named the extinct company as a defendant "improvidently and improperly and for the purpose of attempting to prevent and interfere with your petitioner's right of removal," etc., "and of fraudulently interfering with the legal jurisdiction of said United States courts over this proceeding." No issue was ever made upon this averment, and the motion to remand was upon other grounds. Averments of fact in a petition to remove, in the absence of some denial by answer or by comparison with the record, must be taken as admitted, and, if sufficient upon their face to justify a removal, all other questions out of the way, will entitle the Circuit Court to maintain its jurisdiction. Dishon v. C., N. O. & R. Co., 133 Fed. 471, 474, 66 C. C. A. 345.

The objection now made is untenable.

The decree will be in all things affirmed.

(153 Fed. 126.)

BONSALL v. PLATT.

(Circuit Court of Appeals, Second Circuit. April 4, 1907.)

No. 203.

CORPORATIONS—CONTRACT FOR SERVICES—FORMATION OF CORPORATION—EFFECT.

Defendant employed plaintiff to assist him in building up a business, under a parol contract that plaintiff was to draw his necessary expenses, and that the balance of his compensation should be determined at a future time, when plaintiff had proved his worth in the business, and that plaintiff should consider that he was "in with" defendant in the business, and that it was half his own. After the business commenced to succeed, defendant formed a corporation, in order to better conduct the same, and became the owner of all the stock; plaintiff being elected president, treasurer, and one of the directors, which office he continued to hold until he resigned, in 1903. No action was ever taken by the corporation with reference to the payment of salaries, and no salary was ever fixed during plaintiff's employment. *Held*, that plaintiff's services, rendered after the organization of the corporation, were rendered under the original contract, and that the organization of the corporation did not relieve defendant from liability therefor.

In Error to the Circuit Court of the United States for the Southern District of New York.

F. W. Russell, Louis Lowenstein, and Wentworth, Lowenstein & Stern, for plaintiff in error.

R. B. Honeyman and A. Parker Smith, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

Digitized by Google

TOWNSEND, Circuit Judge. The only error claimed herein is in the denial by the trial court of defendant's motion to dismiss the complaint, on the ground that plaintiff had failed to make out a case against the defendant Bonsall, because the services for which a recovery was claimed were rendered, not to him, but to the defendant corporation, the Innovation Trunk Company. The action was brought against both defendants, but at the close of the trial the court held that there was no joint contract on the part of defendants, and required plaintiff to elect as to which of the defendants he would claim was liable for the services rendered. The plaintiff elected to hold the defendant Bonsall. The complaint was amended accordingly, and was dismissed as against the Innovation Trunk Company. No question is raised as to the value of the services rendered, and both defendants are solvent.

The evidence for the plaintiff material to the question raised by defendant is as follows: Defendant, claiming to be the inventor of a new trunk, had been acquainted with the plaintiff for some 12 years, and in June, 1889, the following conversation took place between the parties:

"He [Bonsall] told me he wanted me to come with him and help him build up the business; that he would make it an object for me to do so; that he would properly compensate me, if the business was a success. I told him that I would accept his offer. We did not have any conversation about my expenses until I came with him at his office, and then we talked about the matter, and he said, that the business was small at the time, and that he did not want to add any more expense than he could help; but he told me to draw what I considered necessary to use for my expenses. I had no other conversation with him on that subject at that time, further than he stated that I would get my compensation at a future time after I had proved my worth in the business. He told me that I could consider that I was really in with him in the business, and that I could consider it half my own."

Plaintiff took charge of the business, and supervised and managed it and made it successful. On March 5, 1900, defendant caused the defendant corporation to be organized, and became the owner of all the stock. Plaintiff was elected president, treasurer, and one of the directors, and continued to be president until November 17, 1903. No action was ever taken by the corporation with reference to the payment of salaries, and the plaintiff and defendant never had any other material conversation in regard to compensation, except on one occasion, when they were returning together from California, in March, 1903. The plaintiff then suggested that he would be better pleased if he knew exactly what his compensation was to be. Thereupon, according to plaintiff's testimony, the following conversation took place:

"'Now I [Bonsall] am trusting you, and I expect you to trust me, and when I decide it is time to divide this "rake off,"' as he called it, 'in the business, I will do so, but you can rest assured you will be properly taken care of.' * * * I told Mr. Bonsall I had drawn for the past year about $2,500, and he said he didn't give a damn if it was twice that. He expected me to live well and dress well. I was president of the company, and I was to hold my end up, and go around and see people, and he also said I had worked hard enough to enjoy a little let up, and he intended I should get it, and he then stated I was to go to Europe, if he could arrange it. * * * I told him: 'This arrangement is not very satisfactory to me. In case of your death I am left out in the cold.' And he said he had arranged his will so that was all taken care of."

Digitized by Google

In November, 1903, as a result of a quarrel between the parties having no connection with this business, the plaintiff resigned. He received no fixed salary, as such, during the time of his employment; but, after the incorporation of the company, he drew some $10,000 or $12,000, which he charged himself with, as salary or expenses. No claim is made for services prior to the incorporation of the defendant company.

Counsel for defendant, in support of his argument, has elaborately discussed various well-settled propositions of law, claiming thereunder that, as the plaintiff was employed by the corporation, as such he could not have been employed by defendant as an individual, or as the owner of the whole stock; that such a contract by defendant would be void as contrary to public policy; and that the plaintiff, as president of the corporation, and having brought suit against it, was estopped from questioning its separate entity.

Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436, chiefly relied upon by counsel for defendant, is not in point. There, the defendant corporation had been in existence for several years when the plaintiff made his contract with Pulitzer, who was practically the sole owner of the property of the corporation. The court found as a fact that when the contract was made the plaintiff supposed he was dealing with one who had authority to act for the corporation, and that both "parties who signed the contract unquestionably intended that the corporation should be bound." The court further found that Pulitzer had authority to make said contract on behalf of the corporation, and that the plaintiff knew this fact. In these circumstances, the court affirmed the decree of the court below enjoining the corporation, which had accepted plaintiff's services, from terminating the contract made with him by Pulitzer on behalf of the corporation.

The argument of defendant proceeds upon the doctrine that, where a corporation has accepted services rendered to it under a contract, it cannot escape liability by a claim that the contract was made without its authority. But we are not called upon to determine whether, if plaintiff had elected to hold the corporation, he might have availed himself of this doctrine upon the theory of ratification and estoppel. Here, the plaintiff stands upon his original contract with defendant Bonsall, which, so far as appears, has never been modified in any way by either party; and, in the disposition of this case, it is unnecessary to consider any of the other questions raised, because, upon the assumed facts, as stated above, they can have no bearing upon the question of fact, which the court properly left to the jury. This question was whether the plaintiff was rendering the services under the original agreement made with the defendant Bonsall, or under a new and independent contract between the plaintiff and the defendant corporation, whereby the plaintiff released the defendant Bonsall from further liability, and agreed thereafter to look to the corporation for payment for his services. The evidence amply supported the finding of the jury, on which their verdict was based, that all the services were rendered under the original contract with the defendant Bonsall. Evidently the organization of the corporation, in which the defendant

Digitized by Google

owned all the stock, was merely a convenient and proper method adopted by him for carrying on his business. There is no question here of novation or public policy, or of the rights of minority stockholders, or of third persons as against either defendant. Under the original contract, the plaintiff was employed to help the defendant to build up the defendant's trunk business in whatever way defendant chose to carry it on, and plaintiff was to get his compensation in the future, when the value of his services had been determined. If the defendant saw fit to have said business run for his benefit under a corporate organization, and in order to accomplish this purpose the plaintiff became, at his request, the president and treasurer and a director of the corporation, these acts were merely incident to, and in furtherance of, plaintiff's original employment, and in accordance with the wishes of his employer. It does not appear that there was any change in the method of carrying on the business.

We cannot accede to the proposition that an individual having large business interests, who employs agents to carry on his business, can relieve himself from his individual responsibility for their services merely by creating a corporation and causing them to be chosen as officers. In order to establish such a claim of change of liability, there must also be evidence of a novation, either express or implied.

Nor can we accede to the highly technical argument that the mere change in form of carrying on the business through a corporation necessarily, as a matter of law, modified the existing respective rights and obligations of the plaintiff and defendant Bonsall. The very fact that, while the corporation was a separate entity, no new contract for services was entered into with the plaintiff, is of itself indicative of the understanding of both parties that the old contract continued in existence.

We conclude that the evidence was sufficient to support the verdict, and that the court properly submitted it to the jury.

The judgment is affirmed.

(150 Fed. 517.)

EVENSON et al. v. SPAULDING et al.

(Circuit Court of Appeals. Ninth Circuit. February 4, 1907.)

1. COURTS—JURISDICTION OF FEDERAL COURT—AMOUNT IN DISPUTE.

In a suit to enjoin the wrongful and unlawful interference with complainant's business, the amount in controversy, for the purpose of the jurisdiction of a federal court, is the value of the right sought to be protected, and a general averment in the bill that the value of the matter in dispute exceeds $25,000, together with further allegations, showing the extent of complainant's business which has been interfered with, and which will be interfered with in the future, unless protected by injunction, tending to show that the value of such right sought to be protected in the future largely exceeds $2,000, are sufficient, when not denied to give the court jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 897.

Jurisdiction of Circuit Courts, as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennet-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

Digitized by Google

2. INJUNCTION—GROUNDS—UNLAWFUL INTERFERENCE WITH COMPLAINANT'S BUSINESS.

Defendant, which was a voluntary association composed of numerous members doing business throughout eastern Washington, organized a subsidiary association known as the "Peddlers' Association" and contributed funds thereto for the purpose of "competing with the peddlers," especially those selling buggies and wagons. The association itself had no property except the fund so contributed, and the majority of its members had no buggies or wagons for sale. Complainant was a manufacturer of wagons and buggies in another state, some of which were shipped to Washington, and there sold by agents, who took a number of vehicles and drove through the country selling chiefly to farmers, and had thus built up a profitable business. Defendant, through its said subsidiary organization, entered upon a systematic course of interference with the business of complainant by employing men, usually two, to follow each agent of complainant. They stopped at the same hotels and stables, started out when he started, and followed him throughout the day to every prospective customer, and interfered with the conversation. They took no vehicles with them, and generally offered none in competition; their sole purpose appearing to be to interfere with and prevent sales by complainant's agents by means of interruptions and false statements respecting complainant and its goods and intimidating and discouraging its agents. *Held*, that such action was unwarranted upon any ground or claim of competition, and was an unlawful attempt to wantonly destroy complainant's business, and was properly enjoined.

3. PARTIES—VOLUNTARY ASSOCIATION—PARTIES BY REPRESENTATION.

A voluntary association having many members may be brought into court under equity rule 48, by service on its officers, and such of its members as are known and can be conveniently reached sufficient being served to represent all the diverse interests.[1]

4. ASSOCIATIONS—LIABILITY OF MEMBERS—ACTS OF SUBSIDIARY ASSOCIATION.

Where a voluntary association creates a subsidiary or branch association as an instrumentality through which to accomplish certain purposes, it is liable for the acts of such subsidiary association to the same extent as though such acts had been done by the entire membership.

5. EQUITY—AMENDMENTS TO BILL—MOTION FOR PRELIMINARY INJUNCTION.

Amendments to a bill, on the hearing of a motion for a preliminary injunction, and before demurrer or answer, *held* properly allowed under equity rule 28, either as relating to matters of form, or as within the discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 559.]

Appeal from the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

For opinion below, see 149 Fed. 913.

This is an appeal from an order granting an injunction pendente lite. The bill alleged in substance that the appellees are engaged in the manufacture and sale of buggies and wagons; that their place of manufacture is in the state of Iowa; that for many years they have been engaged in selling their buggies and wagons in other states, including the state of Washington; that they have had, during the summer season, agents and salesmen in the state of Washington who travel through the country selling buggies and wagons, especially to farmers and others residing in the rural districts; that their wagons and buggies are strong and especially adapted to the needs of farmers, and have acquired a reputation in the state of Washington as buggies and wagons of high grade and excellent quality, purchasable at reasonable prices, and that such reputation and standing of the appellees in said community in said business is of very great value to them; that a few months prior to the

[1] See note at end of case.

Digitized by Google

filing of the bill, many of the dealers in hardware and farming implements in eastern Washington conspired and confederated together for the purpose of monopolizing such business in such section, and especially for the purpose of preventing manufacturers and dealers in hardware and farming implements residing without the limits of the state of Washington from selling any of such goods, wares, and merchandise in such state at retail, and to prevent the appellees from selling their buggies and wagons at retail to farmers and others in the rural districts; that said local dealers formed an association under the name of the "Inland Empire Implement and Hardware Dealers' Association;" that some of the members are dealers in hardware, and are not engaged in the business of selling buggies and wagons or other farming implements, while others are local dealers in farming implements; that the association includes members residing in the counties of Spokane, Lincoln, Douglas, Adams, Perry and Okanagan; that the members of such association raised a fund of $10,000, and placed the same in the hands of the appellant Evenson, to be used for the purpose of preventing the appellees from selling any buggies or wagons in eastern Washington at retail; that for several weeks last past the appellees have had about 20 employés engaged in selling buggies and wagons in eastern Washington; that their method of doing business was to drive through the rural districts hauling from two to four wagons and stopping at farmhouses and other places where customers would probably be, offering the same for sale; that before offering said buggies and wagons for sale the appellees paid the taxes thereon as provided by statute, and, in other respects, complied with the statutes of the state of Washington; that said association, through the appellants Evenson, Lucas, and Hay, unlawfully interfered with the business of the appellees, and have threatened, intimidated, harassed, and annoyed their employés, and the persons with whom they were transacting business; that they have had said employés followed day and night, so that wherever one of them went, he was dogged, sometimes by one, but generally by two of the employés of said association—some of said followers being armed with guns and rifles, some of them being unarmed; that whenever the employé of the appellees undertook to converse with a farmer or other probable purchaser, such conversation would be interrupted by the said followers, and the latter would undertake to dissuade such probable purchaser from purchasing goods of the appellees, suggesting that they ought to purchase of resident dealers who resided in the community; that the said followers were not undertaking to sell any buggies or wagons, nor did they claim to represent any competitor of the appellees or any dealer in buggies or wagons; that the sole object and purpose was in all cases to prevent the appellees from making sales, to the end that they might be driven out of business in the state of Washington; that said followers undertook and have undertaken to persuade purchasers to violate their contracts, whereby they have purchased goods from the appellees; that several of such followers, at the instance of said association, have been appointed deputy sheriffs, and one of the agents of the appellees was arrested upon a false and malicious charge of peddling goods without a license by one of the said followers so appointed a deputy sheriff, all at the instance of the association, and in furtherance of said conspiracy; that said conduct on the part of the agents of said association has been carried on for several weeks and numerous sales have been lost as a result thereof, and the employés of the appellees have become alarmed and discouraged, and will, unless said acts of said followers are stopped, quit the employment of the appellees, and the appellees will be unable to further carry on their business in the state of Washington; that, in pursuance of such nefarious scheme, the association has circulated false and slanderous matter concerning the appellees and their buggies and wagons, and have falsely stated that the latter are of inferior quality, and are being sold at a price greatly in excess of prices charged by local dealers, all of which is false and known to be false by the appellants, and that they have circulated stories to the effect that the appellees and their employés are perpetrating frauds on their customers in various ways, which the bill proceeded to set forth. The bill alleged "that there is no adequate remedy at law, that the value of the matter in dispute exceeds, exclusive of interest and costs, the sum of more than $25,000, and that your orators have been damaged

Digitized by Google

by the said acts and conduct of said defendants in excess of the sum of $25,000." After setting forth that the threatened injury would be irreparable unless stayed by the court, the bill prays for an injunction and for judgment against the appellants for $25,000 and for such further relief as shall be just and proper. With the bill affidavits were filed. Thereafter further affidavits were filed when the matter came on to be heard on the application of the appellees for an injunction pendente lite upon the bill and the affidavits of the appellees and the counter affidavits of the appellants. Upon consideration of the bill and the facts set forth in the affidavits, the court enjoined the appellants pendente lite "from preceding or following in close range any employé, agent, or servant of the complainants, or the teams used by them or any of them in such manner as to hinder, obstruct, harass, annoy, or intimidate the complainants or any of their employés in the free use of the highway, and from in any other manner occupying said highway in such a manner as to hinder, obstruct, harass, annoy, or intimidate the complainants or any of their employés in the free use thereof; also from approaching or speaking to any actual or supposed customer or customers of the complainants so long as complainants' agents or servants are personally present and engaged in selling or negotiating the sale of any buggy or wagon, for the purpose of defeating such sale by the complainants; also from resorting to any species of intimidation, force, or fraud, or any conduct that would imply intimidation, force, coercion, or fraud, for the purpose of preventing complainants from selling buggies or wagons and carrying on said business of selling buggies or wagons."

H. J. Hibschmann and Merritt, Oswald & Merritt, for appellants.
F. T. Post, A. C. Lyon, and H. H. Stipp, for the appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is earnestly contended that the court had no jurisdiction of the cause, for the reason that it did not appear from the bill that the requisite amount in controversy was involved. As we read the allegation of the amount in controversy, it is that the value of the matter in dispute exceeds $25,000, and that, in addition thereto, the appellees have been injured by the acts of the appellants in excess of the sum of $25,000. The statement of the amount involved is made under oath. It is not denied either by plea, answer, or by any affidavit. It is true that the bill does not set up the value of the appellees' business, or specifically allege the extent to which it will be damaged by the acts of the appellants, but it is clear from the averments of the bill that the matter in dispute, the value of which in the complaint is laid at more than $25,000, is the right of the appellees to conduct their business in the state of Washington. The bill sets forth the damages which have been sustained by the appellees within the few weeks prior to the commencement of the suit and presents facts, showing the extent of their business in the state of Washington, which has been interfered with, and which will be interfered with in the future unless protected by injunction. A case in point is Butchers' & Drovers' Stockyards Co. v. Louisville & N. R. Co., 67 Fed. 35, 14 C. C. A. 290, in which Judge Taft, speaking for the Circuit Court of Appeals, said:

"The averment of the bill is that the injury and damage done to its business by the refusal of the railroad company to afford to it such transportation and shipping facilities is irreparable, and largely exceeds the amount of the sum of $2,000. The damage done by the refusal is to be estimated by the value of the right denied, and therefore the allegation that the damage large-

Digitized by Google

ly exceeds $2,000 is inferentially a statement that the value of the right denied is largely in excess of $2,000. Even if this averment refers, as claimed by counsel, to damages sustained by complainant before the filing of the bill, it gives rise to the necessary implication that the subsequent permanent injury, unless enjoined, will exceed in pecuniary amount that already suffered because the past damages only covered a period between the demand and the filing of the bill."

Other cases in point are Pennsylvania Co. v. Bay et al. (C. C.) 138 Fed. 203; Board of Trade of the City of Chicago v. Cella Com. Co. 76 C. C. A. 28, 145 Fed. 28.

The affidavits sufficiently sustained the allegations of the bill and the conclusion of the court below, and showed that the appellants were pursuing a systematic course of interference with the business of the appellees in peddling buggies and wagons in the state of Washington; that as an agent of the appellees would go through the country taking in his train a number of buggies or wagons, the agents of the appellants would follow, generally in pairs in order the better to watch, harass and dog the steps of the peddler. Wherever the peddler would stop, the followers stopped; wherever he lodged, they lodged. As he started out in the morning, they were close in pursuit. Whenever he engaged in conversation with a customer, they would interrupt the conversation and advise the customer not to buy, and "to prevent trouble," the customer would often refuse to buy. The followers in nearly every instance had no vehicles of their own to offer. Their declared purpose was to prevent the appellees' agents from making sales. The result was frequent personal altercations and in one instance a fist fight. The appellees' agents were often intimidated. Some of the followers carried rifles, some of them had been made deputy sheriffs, and, in one instance, one of the appellees' agents was arrested by such a sheriff under the provision of a law which had been declared void by the superior courts of the state of Washington. The proof showed a practical destruction of the business of the appellees in the state of Washington, and that the purpose of the appellants, and it is not by them anywhere denied, was to continue in the course of action complained of. It is contended on behalf of the appellants that their acts were but the acts of competitors in business, and that they had the legal right to go upon the highways and engage in conversation with any one; and, in general, to do the acts which are complained of. This contention cannot be sustained. The association was a combination of men engaged in various lines of business. It had no property of its own save the money that was raised for the purpose of interfering with the appellees. It had not, nor had the majority of its members, any buggies or wagons for sale. It did not, as a general thing, send out such merchandise upon the road to offer it in competition with the merchandise of the appellees. Its sole object and purpose, so far as disclosed by this record, was to break up the business of the appellees in the state of Washington.

The appellants contend that their combination in itself was not unlawful, that no unlawful means were used in furtherance of it and that the damage to the appellees, if any they sustained, was the natural and unavoidable result of competition, incident to the carrying on of the appellants' business in a lawful manner. It is to be admitted that the appellees have no right to be protected against competition, and that

Digitized by Google

the appellants have the right to push any lawful trade by all lawful measures and to keep and maintain the benefit thereof, and to exclude others from participation in it if they can. But, while the appellees have no right to protection against competition, they have the right to protection against wanton and malicious interference and annoyance. It is true that the acts of interference complained of in the bill, and proved by the affidavits, were, for the most part committed upon the public highway, but the particular spot upon the highway or elsewhere where the appellees were offering their goods for sale was, for the time being, their place of business. We do not say that they had any exclusive right to be there, or that the appellants had not the right to go upon the same highway with goods and to follow the appellees' goods with like goods of their own, if they had such, and offer the same in competition with the appellees and to the same customers. But that is not what was done. The appellants' agents took with them no goods, and generally they offered none in competition. Their sole purpose appears to have been to interfere with and prevent sales by the appellees. This they accomplished by breaking in upon conversations, interrupting sales, and making false representations as to the nature of the appellees' goods, and the manner in which they treated the purchasers thereof and other offensive acts. Their purpose was not to sell goods of their own, and thereby interfere with sales by the appellees, but it was, by pursuing a policy of molestation, to drive the appellees out of business and out of the country. The right of competition furnishes no justification for such acts. This is in accordance with the decided weight of authority. State v. Huegin (Wis.) 85 N. W. 1046, 62 L. R. A. 700; Jackson v. Stanfield (Ind. Sup.) 36 N. E. 345, 23 L. R. A. 588; Van Horn v. Van Horn (N. J. Err. & App.) 28 Atl. 669; Ferd. Heim Brewing Co. v. Belinder (Mo. App.) 71 S. W. 691; Ertz v. Exchange Co. (Minn.) 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. Rep. 433; Graham v. St. Charles St. R. Co. (La.) 16 South. 806, 27 L. R. A. 416, 49 Am. St. Rep. 366; Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99; Standard Oil Co. v. Doyle (Ky.) 82 S. W. 271.

It is assigned as error that the court held that the appellees were entitled to an injuncion as against members of the Inland Empire Implement and Hardware Dealers' Association, who were not served, and made no appearance in the suit, the association being a voluntary association not incorporated so that it could be made a party defendant. There is an exception to the rule that such an association may not be made a defendant by suit against or service upon its officers, and that is the exception contemplated by equity rule 48, which provides that when the parties on either side are very numerous and cannot, without manifest inconvenience and oppressive delays be all brought before it, the court in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the diverse interests. The bill brings the case within the exception by alleging that the membership of the association is very large, and that the appellees cannot ascertain the names of more than a few thereof. The record shows that the parties before the court were E. E. Lucas, the president of the association, and Edward W. Evenson,

Digitized by Google

the secretary, treasurer, and active manager thereof, and, in addition to these facts, it appears that the association has under its name made a general appearance in the suit. Upon the filing of the appellants' affidavits, the membership of the association was disclosed, and the appellees thereupon offered during the hearing an amendment, adding the names of many other members of the association, and embodying the names of the three members who composed what was called the "Peddlers' Committee." The peddlers' committee, it appears, was formed at a meeting of the association for the purpose of forming "some plan to compete with the peddlers." Under the plan which was adopted, each resident dealer in ranges or vehicles who belonged to the association was to be asked to pay, not into the treasury of the Peddlers' Association, but into the treasury of the Inland Empire Implement and Hardware Dealers' Association the sum of $20, and all manufacturers and jobbers in ranges and vehicles in the territory, or who solicited trade therein, were to be asked to contribute $100. The money so collected was to be used to pay expenses in offering such competition to peddlers as would enable resident dealers to hold their trade, and the adopted plan proceeded to specify the method of carrying on that competition. It appeared in the affidavit of Evenson that the branch of the defendant association known as the "Peddlers' Association" was organized by the general association. These facts show that the Peddlers' Association was the creature of the larger association and the instrumentality which it used to carry out its general purposes. The lower court so found, and we discover no error in that conclusion.

It is contended that there was error in permitting the appellees to make amendments to their bill. The first amendment was filed during the hearing, and in response to the objection that the bill did not plainly allege that the appellants threatened to continue their unlawful acts. This was an amendment in matter of form, and permissible under equity rule 28. The requirements of the rule were complied with. The second amendment was also filed during the hearing, and after the appellants had attacked the bill, on the ground that the Inland Empire Implement and Hardware Dealers' Association was a voluntary association, and that no sufficient number of its members had been made parties defendant to subject it to the jurisdiction of the court. To allow or reject this amendment was discretionary with the court, and its ruling is not reviewable here. Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800. It is contended that there is in the bill a misjoinder of causes of suit. No such objection to the bill was presented to the court below, nor is there an assignment of error based on such alleged misjoinder. The contention therefore cannot be considered here.

Complaint is made that the injunction goes further than the court was warranted in going, in that it enjoins the appellants from approaching or speaking to any actual or supposed customer of the appellees, so long as the latter's agents are personally present and engaged in selling or negotiating the sale of any buggy or wagon, for the purpose of defeating such sale. This part of the injunction, it may be conceded, trenches upon delicate ground. For the present we are not prepared to say that, in so ordering, the court below was not acting

Digitized by Google

within its discretion, or that substantial rights of the appellants were thereby invaded. The appellees had the right to offer their goods for sale, and to discuss the merits thereof, and the terms of sale. The appellants had no right to prevent them from doing this. If to interfere in conversations was tantamount to preventing the appellees' agents from conducting their business, it was an unwarranted interference.

The order for an injunction pendente lite is affirmed.

NOTE.

Who May be Parties in Actions by or Against Associations.

I. In General.

[a] (Conn. 1870) Under Gen. St. tit. 1, § 65, providing that "any number of persons associated together as a voluntary association, not having corporate powers, but having some distinguishing name, may be sued" by the name by which the association is known, a company in a militia regiment, duly organized, formed by voluntary enlistment, is a voluntary association, and may be sued by the name by which known.—Fox v. Naramore, 36 Conn. 376.

[b] (Ind. 1878) An association organized for the purchase of a driving park, and for the encouragement of horse racing, may bring suit in its own name against subscribers to the premiums offered by the directors for certain races.—Mullen v. Beech Grove Driving Park, 64 Ind. 202.

[c] (Iowa, 1879) A. bought, at a foreclosure sale, land mortgaged by a society, and later bought the membership tickets of all the members of the society but one. After this the society never met, and no officers were elected. *Held*, that there could be no action in the name of the society to set aside the conveyance to A.—Union Agricultural Soc. v. Gamble, 52 Iowa, 524, 3 N. W. 531.

[d] (Ky. 1901) Under Const. § 208, providing that "the word 'corporation' as used in this Constitution shall embrace joint-stock companies and associations," and Ky. St. § 457, providing that "the words 'corporation,' 'company,' may be construed as including any corporation, company, person, persons, partnership, joint-stock company or association"—an association of 3,000 members will be treated as a quasi corporation for the purpose of service of process.—Adams Exp. Co. v. Schofield, 64 S. W. 903, 23 Ky. Law Rep. 1120.

[e] (Md. 1872) Under Code 1868, c. 471, § 215, it is sufficient, in a suit by or against an association, to describe it by the name or title by which its business is transacted.—Powhatan Steamboat Co. v. Potomac Steamboat Co., 36 Md. 238.

[f] (Mich. 1880) An unincorporated society cannot bring suit in its society name.—Detroit Schuetzenbund v. Detroit Agitations Verein, 44 Mich. 313, 6 N. W. 675, 38 Am. Rep. 270.

[g] (Mich. 1903) Comp. Laws, § 10,025, providing that actions may be brought against unincorporated voluntary associations by the name by which they are known, and further providing that the act shall not take away the right of the litigant to proceed against the member of the association, affords an additional or cumulative remedy to that existing theretofore, and does not preclude a suit against the members and against the association jointly.—Detroit Light Guard Band v. First Michigan Independent Infantry, 134 Mich. 598, 96 N. W. 934, 10 Detroit Leg. N. 585.

[h] (N. Y. 1891) Plaintiff, claiming to be entitled to compensation for his services on the ground that he had not enjoyed the benefits secured to him by an agreement entered into with a community, cannot sue the corporation succeeding the community, or the individual members of the community, but his action should be against the community.—Burt v. Oneida Community, 61 Hun, 626, 16 N. Y. Supp. 289.

[i] (Ohio, 1861) The act of 1846, which permits unincorporated companies formed for the purpose of carrying on any trade or business to sue in their

Digitized by Google

firm name applies, not only to Ohio firms, but also to firms in other states.—King v. Nichols, 2 Ohio Dec. 564.

[j] (Pa. 1894) An action may be maintained in the general name of an unincorporated society, where there is no plea in abatement, and there are individual plaintiffs responsible for costs.—Liederkranz Singing Soc. v. Germania Turn-Verein, 163 Pa. 265, 29 Atl. 918, 43 Am. St. Rep. 798.

[k] (Pa. 1898) In cases of unincorporated associations whose membership is large, suits may be brought in the name of the association by certain of its members, naming them.—Powell v. Dunn, 7 Pa. Dist. R. 275.

[l] (Wis. 1862) Where the trustees of a lodge of the Independent Order of Odd Fellows have been wrongfully deprived of the possession of real property belonging to them in their character as trustees, and such property is wrongfully withheld from them, an action for its recovery is properly brought in the name of the lodge.—Chickerming Lodge v. McDonald, 16 Wis. 112.

II. MEMBERS.

[a] A suit by an unincorporated company must be brought in the names of its members, and not in the name of the company.

—(U. S. 1880) Metal Stamping Co. v. Crandall, Fed. Cas. No. 9,493c;
(Fla. 1885) Richardson v. Smith, 21 Fla. 336;
(Ind. 1880) Mackenzie v. School Trustees, 72 Ind. 189.

[b] An action on a contract with an unincorporated association must be brought in the name of all the individuals composing it.

—(La. 1848) Soller v. Mouton, 3 La. Ann. 541;
(Me. 1870) McGreary v. Chandler, 58 Me. 537.

[c] (Cal. 1860) In a bill against an association composed of a large number of members, a nonjoinder is not fatal.—Gorman v. Russell, 14 Cal. 531.

[d] (Ill. 1844) Where some 28 persons are associated together for the purpose of trade, the legal title to all their property being in a part of them for the benefit of the whole, it is sufficient if those having the legal title be made parties defendant or complainant in a bill in equity.—Martin v. Dryden, 6 Ill. (1 Gilman) 187.

[e] (Ill. 1895) An unincorporated society composed of many persons can maintain an action at law only in the names of all members, however numerous.—O'Connell v. Lamb, 63 Ill. App. 652.

[f] (Ill. 1905) Where a voluntary association appears in a bill as the complainant, but the same is signed and specifically consented to by an indorsement thereon by all the individual members of such association, such individual members will be deemed thereby to have become parties complainant thereto.—Franklin Union, No. 4, v. People, 121 Ill. App. 647; Kitchel v. Same, Id.; Smith v. Same, Id.; Mucher v. Same, Id. Judgment affirmed (1906) 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248.

[g] (Iowa, 1844) All the members of a voluntary association should join in an action; but, to prevent inconvenience and delay, a part may commence proceedings in behalf of all, if the petition sets forth facts to justify that course. —McConnell v. Gardner, Morris, 272.

[h] (Iowa, 1855) A suit brought in behalf of an association must be brought in the name of all the members, or in the name of one or more for the use of all.—Pipe v. Bateman, 1 Iowa (1 Clarke) 369.

[i] (Iowa, 1906) An action by members of an unincorporated telephone association, brought for a large number of unnamed persons alleged to constitute the association, and brought for a breach of contract with such association, is, in effect, a suit for the association which cannot be maintained.—Westbrook v. Griffin, 109 N. W. 608.

[j] (Md. 1868) Although a voluntary association cannot sue in a corporate capacity, yet members of the association may sue as such.—Mears v. Moulton, 30 Md. 142.

[k] (Mich. 1900) The statute (sections 10,025, 10,026, Comp. Laws) providing for the bringing of suits against unincorporated voluntary associations does not abrogate the right to sue members of the association.—Jenkinson v. Wysner, 125 Mich. 89, 83 N. W. 1012, 7 Detroit Leg. N. 406.

Digitized by Google

[l] (Minn. 1905) Voluntary unincorporated associations not engaged in some business enterprise can neither sue nor be sued in their association name, but actions in which they are involved must be brought in the name of the members.—St. Paul Typothetæ v. St. Paul Book Binders' Union No. 37, 94 Minn. 351, 102 N. W. 725.

[m] (N. J. 1882) In a suit in equity against an unincorporated association, of numerous members, it is not necessary to make all the members parties, but it is enough if so many be made parties as to insure a fair trial.—Van Houten v. Pine, 36 N. J. Eq. (9 Stew.) 133.

[n] (N. Y. 1851) The mere fact that a society is unincorporated, and its members numerous, will not warrant a suit by one of the members to collect a security given to the society.—Habicht v. Pemberton, 6 N. Y. Super. Ct. (4 Sandf.) 657.

[o] (N. Y. 1884) Where a member of an association for the manufacture of cheese buys milk to be made into cheese, and the milk proves to be diluted, the member, and not the association, is the proper party to recover the penalty given by law to the purchaser of diluted milk.—Blount v. Wetherell, 32 Hun, 386.

[p] (N. Y. 1887) One member of an unincorporated association may sue for the benefit of all, under Code Civ. Proc. § 448, providing that, "where the persons who might be made parties are very numerous, * * * one or more may sue for the benefit of all," though section 1919 provides that actions by or against unincorporated associations of more than seven persons may be maintained in the name of the president or treasurer.—Bloete v. Simon, 19 Abb. N. C. 88, 12 Civ. Proc. R. 114.

[q] (N. Y.) Code Civ. Proc. § 1919, permits an action against a voluntary association having a president and treasurer to be brought against those officers as such. Section 1923 expressly provides that the other provisions of the article (which includes section 1919) shall not prevent an action being brought against all the members of an association, except where an action has already been brought against the president or treasurer. *Held*, that an action may be brought, in the first instance, against all the members.—(1889) Hudson v. Spaulding, 53 Hun, 638, 6 N. Y. Supp. 877; (1892) Schwartz v. Wechler (Com. Pl.) 2 Misc. Rep. 67, 20 N. Y. Supp. 861, 29 Abb. N. C. 332, 23 Civ. Proc. R. 21.

[r] (N. Y. 1898) Code Civ. Proc. § 1922, providing that, where an action has been brought against the president or treasurer of an unincorporated association, an action against the members cannot be instituted, until, etc., only applies to liability of members as such; and an action may be maintained against both the officer and the individual members to recover damages for a conspiracy, where the individual defendants are charged with personal wrongdoing.—April v. Baird, 32 App. Div. 226, 52 N. Y. Supp. 973.

[s] (N. Y. 1899) An action against a voluntary unincorporated association should be dismissed, where it does not appear to have been instituted against all the members, under Code Civ. Proc. § 1923.—Hanke v. Cigar Makers' International Union, 27 Misc. Rep. 529, 58 N. Y. Supp. 412.

[t] (N. C. 1801) Although it is not necessary that all the members of an unincorporated association, where the number is large, should join in a bill for the benefit of the association, yet some of the members must be made complainants.—Marshall v. Lovelass, Cam. & N. 217.

[u] (Ohio, 1887) Where a debt is contracted by a voluntary association, so as to make consenting members liable therefor, and it is sought to recover the demand from such members by action, all of them must be joined as defendants, since the liability is joint, if they are within the jurisdiction of the court.—Higdon v. Gardner, 2 Ohio Cir. Ct. R. 340.

[v] (Or. 1888) Code, § 385, provides that in suits in equity, where the question is one of common or general interest to many, or where the parties are numerous, and it may be impracticable to bring them all into court, one or more may sue for all. *Held*, that one or more of the members of an unincorporated association may sue for the benefit of the whole, to enforce a right in favor of the association which is cognizable in equity, where the mem-

Digitized by Google

bers comprising it are so numerous that it would be impracticable to bring them all before the court.—Liggett v. Ladd, 17 Or. 89, 21 Pac. 133.

[w] (Pa. 1896) A suit by or against an unincorporated society may be brought in the name of some of the members, as representing all.—Virtue v. Ioka Tribe (Com. Pl.) 5 Pa. Dist. R. 634.

[x] (Pa. 1898) In cases of unincorporated associations whose membership is large, suits may be brought in the names of certain of the members in behalf of themselves and all others interested in the association, naming it.—Powell v. Dunn, 7 Pa. Dist. R. 275.

[y] (Tex. 1900) Where a contract was made for the benefit of a voluntary association, the members of the association may maintain an action for its breach, since a right accruing to the organization inures to the benefit of its members.—Ackermann v. Ackermann Schuetzen Verein, 60 S. W. 366.

[z] (Vt. 1906) V. S. 1183 provides that, where an execution on a judgment against a partnership or association is returned unsatisfied, a suit for the amount unpaid may be brought against any or all of the partners or associates upon their original liability. *Held*, that a suit may be brought against one or more of the associates of an association, without making all the associates defendants.—Tarbell & Whitham v. Gifford, 65 Atl. 80.

III. Officers or Persons Acting as Such.

[a] (U. S. 1896) All the directors of an unincorporated association are necessary parties to a suit against it arising out of contractual relations, even though a less number have authority to transact business.—Greer, Mills & Co. v. Stoller (C. C.) 77 Fed. 1.

[b] (Ala. 1837) No action can be maintained by the treasurer of an association, not incorporated, upon a written promise to pay money as a subscription; the same being payable to the treasurer of such association alone.—Ewing v. Medlock, 5 Port. 82.

[c] (Cal. 1888) Under Code Civ. Proc. § 382, providing that, when a question is "one of a common or general interest of many persons," one or more may sue for the benefit of all, the treasurer of a fire association, being the representative of its members, may sue an ex-treasurer, who is himself a member, for funds in his hands belonging to the association.—Gieske v. Anderson, 77 Cal. 247, 19 Pac. 421.

[d] (Colo. 1894) Where the constitution of an association provides that the treasurer shall have the custody of its personalty, one who is merely acting as treasurer, without having been elected, cannot sue for such property though the original appointee has gone out of office.—Dwelle v. Plummer, 5 Colo. App. 113, 37 Pac. 947.

[e] (Ill. 1896) In a suit against an unincorporated association, the members of which are so scattered as to render service upon all impossible, service upon its officers is sufficient to give the court jurisdiction over the members.—Fitzpatrick v. Rutter, 160 Ill. 282, 43 N. E. 392.

[f] (La. 1848) The president of an unincorporated society cannot recover on a contract of the association in an action brought by him individually.—Soller v. Mouton, 3 La. Ann. 541.

[g] (Me. 1883) A note made payable to the treasurer of a society, not by name, and assigned to A., is properly sued by A. in the name of the successor in office of the treasurer to whom the note was given.—McDonald v. Laughlin, 74 Me. 480.

[h] (Neb. 1894) An action to enforce a subscription to an unincorporated association should be brought in the name of the official in whom is vested the real property proposed to be improved by the fund subscribed.—Egan v. Bonacum, 38 Neb. 577, 57 N. W. 288.

[i] (N. J. 1896) Where the articles of association of an unincorporated company provide that the government of the association shall be vested in a board of governors, a member of such board is an "officer" of the company on whom process against the company may legally be served.—Camden, G. & W. R. Co. v. Guarantors of Pennsylvania, 59 N. J. Law (30 Vroom) 328, 35 Atl. 796.

[j] (N. Y. 1853) An unincorporated voluntary association may maintain an action in the name of its proper officer for the recovery of property, without

Digitized by Google

making all members of the association parties.—Blakely v. Curcaden, 2 Edm. Sel. Cas. 388.

[k] (N. Y. 1856) An action was brought, on a promissory note belonging to an association of more than seven persons, in the name of the treasurer of the association. *Held*, that the action was well brought, the complaint stating the fact that "the association consisted of seven associates and upwards." —Tibbetts v. Blood, 21 Barb. 650.

[l] (N. Y. 1856) Where property sued for belongs severally to the members of an association, but the association, as such, does not own any interest therein, the suit cannot be brought in the name of the president of the association.—Corning v. Greene, 23 Barb. 33.

[m] (N. Y. 1857) The acts of 1849 and 1851 allowing joint-stock companies to sue and be sued in the name of their presidents and treasurers do not embrace the fire companies of the city of New York.—Masterson v. Botts, 4 Abb. Prac. 130.

[n] (N. Y. 1867) Under Acts 1849, c. 258, as extended by Acts 1851, c. 455, the right to sue in the name of the president or treasurer of an association is extended to other companies and associations than such as are organized in pursuance of the statute. Such an action may be brought by the treasurer of any company or association composed of not less than seven persons jointly interested in property or its proceeds.—Bridenbeker v. Hoard, 32 How. Prac. 289.

[o] (N. Y. 1875) It is not necessary that the individuals comprising the membership of a voluntary association, consisting of more than seven associates, should be made parties to an action against it. The action is well brought against the president of the association, named as defendant.—Olery v. Brown, 51 How. Prac. 92.

[p] (N. Y. 1880) Where the action is transitory, 3 Rev. St. (6th Ed.) p. 762, providing that where an association consists of more than seven members an action may be brought in the name of the president, extends the remedy to foreign as well as local associations.—Clancy v. Terhune, 1 City Ct. R. 239.

[q] (N. Y. 1881) Before the individual members of an unincorporated association, consisting of more than seven members, and having by-laws and a treasurer, can be sued for a debt of the association, an action must first be brought against the president or treasurer, as prescribed by Code, § 1919.—Flagg v. Swift, 25 Hun, 623.

[r] (N. Y. 1885) Under the existing statutes a member of an unincorporated association can sue the association by suing one of its officers.—Sander v. Edling, 13 Daly, 238.

[s] (N. Y. 1885) A lodge of Masons is within Laws 1849, c. 258, amended by Laws 1851, c. 445, requiring actions against certain associations to be in the name of their treasurers.—Cohn v. Borst, 36 Hun, 562.

[t] (N. Y. 1891) Under Code Civ. Proc. § 1919, providing that the president or treasurer of an unincorporated association of seven or more persons may sue on any cause of action accruing to all of the associates, the right of the treasurer of such an association, formed in pursuance of a charter granted by a general organization of such associations, to sue upon a note executed to such treasurer, is not impaired by an order of the executive board of the general organization, revoking such charter.—Wells v. Monihan, 59 Hun, 617, 13 N. Y. Supp. 156; Id., 129 N. Y. 161, 29 N. E. 232.

[u] (N. Y. 1892) An association known as the "Law and Order League" of a certain town was formed pursuant to a resolution adopted at a public meeting of citizens. The constitution, which was signed by each member, declared that the object of the league was to secure the enforcement of certain laws, and that the members should consist of (1) a central committee, composed of three persons appointed by each church and temperance society in the town, and three persons appointed by the league; and (2) of all other persons who should sign the constitution. A president, two vice presidents, and a treasurer were provided for, to constitute an executive committee. The executive and central committees were to meet once a month to adopt measures for carrying out the objects of the league. Funds were raised by collections at the meetings, and by subscriptions to what was called the "guaranty fund." *Held*, that an action for services rendered by an attorney at law employed by the

Digitized by Google

president, in conducting prosecutions under the laws which the league was designed to enforce, could not be maintained against an officer, as provided by section 1919, since there was nothing in the organization of the league, its constitution, objects, or methods, which indicated an intention to create a partnership between the members, or that they should be liable for debts transacted by its officers or committees.—McCabe v. Goodfellow, 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204, reversing (1891) 61 Hun, 619, 15 N. Y. Supp. 377, 21 Civ. Proc. R. 65.

[v] (N. Y. 1899) An action against a voluntary unincorporated association should be dismissed, where it does not appear to have been brought, as required by Code Civ. Proc. § 1919, against the president or treasurer, where it has such officers.—Hanke v. Cigar Makers' International Union of America, Local Union No. 10, 27 Misc. Rep. 529, 58 N. Y. Supp. 412.

[w] (N. Y. 1900) Where the president and a minority of the members of an association, which has not adopted rules for its government, withdrew at a regular meeting, on differing with the majority as to incorporation, and the majority duly adjourned to a subsequent date, when they removed the president and elected another in her place, without notice to her, the member elected was entitled to sue, as president, to recover property belonging to all the members, the same as "all the associates" could have sued "by reason of their interest or ownership therein," as authorized by Code Civ. Proc. § 1919. Judgment Ostrum v. Greene (1898) 30 App. Div. 621, 52 N. Y. Supp. 1147, affirmed.—Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919.

[x] (N. Y. 1900) Code Civ. Proc. § 1919, authorizes the bringing of a suit against the president of an unincorporated association for the recovery of a debt incurred by it; and section 1921 provides that no execution shall be issued against the property or person of such president on the judgment, and that its docketing shall not bind his property. *Held* that, where it was undisputed that defendant had resigned from the office of president of an unincorporated association prior to the service of a summons on him as such, the summons would be set aside on his motion, since the validity of a judgment against the association depended on his official connection therewith.—Mason v. Holmes, 30 Misc. Rep. 719, 64 N. Y. Supp. 596.

[y] (N. Y. 1902) Under Code Civ. Proc. § 1919, providing that "an action * * * may be maintained against the president or treasurer of an unincorporated association * * * upon any cause of action, for or upon which the plaintiff may maintain such an action * * * against all the associates by reason of * * * their liability therefor either jointly or severally," an action may be maintained against the president of such an association to recover damages resulting from a conspiracy entered into by all its members to injure plaintiff's business.—Rourke v. Elk Drug Co., 75 App. Div. 145, 77 N. Y. Supp. 373.

[z] (Tex. 1907) While a society lodge acting under a charter granted by a supreme lodge, incorporated by the state under Sp. Laws 1879, p. 3, c. 6, may have power to sue, such power is not exclusive, but its officers, having the legal title and holding property in trust for it, may sue to recover it.—Rhodes v. Maret, 101 S. W. 278.

IV. Trustees or Agents.

[a] (Ill. 1862) Actions by the subordinate lodges of Odd Fellows should be brought in the name of the trustees of such lodges.—Marsh v. Astoria Lodge, 27 Ill. (17 Peck) 421.

[b] (Ill. 1876) Where a contract is made with a leader of a band to furnish musicians at a fair, and payment is refused, the suit on the contract should be brought by the leader, and not by the members, of the band.—Corbett v. Schumacker, 83 Ill. 403.

[c] (Ill. 1886) A vote of a military company, transferring to its trustee a note payable to its captain for money borrowed of the company, gives the trustee sufficient interest to maintain a bill in equity thereon.—Waugh v. Andel, 21 Ill. App. 389.

[d] (Iowa, 1862) Under Rev. St. 1860, § 2758, a trustee of an unincorporated voluntary association may sue in his own name for the benefit of the company. —Laughlin v. Greene, 14 Iowa, 92.

Digitized by Google

[e] (Me. 1854) Certain members of a lodge of Odd Fellows borrowed money of the funds, giving their note payable to "A. B., secretary of." *Held*, that A. B. might sue on the note, being authorized thereto by the lodge, though he had ceased to be its secretary.—Whitcomb v. Smart, 38 Me. 264.

[f] (Me. 1855) The trustees of a voluntary association, who have loaned the funds of the association to one of the members, and taken his note in their capacity of trustees, may maintain an action against him on the note; and, if they are superseded, their successors may maintain the action in the name of the original trustees, at the request of the association, notwithstanding a release of the action by the original trustees.—Pierce v. Robie, 39 Me. 205, 63 Am. Dec. 614.

[g] (Me. 1904) Lodges may maintain actions in the name of their trustees for the time being.—Coombs v. Harford, 99 Me. 426, 59 Atl. 529.

[h] (Mich. 1880) Trustees of an unincorporated society may maintain an action to enforce promises made in its behalf.—Allen v. Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159.

[i] (Mo. 1896) When property belongs to an unincorporated association, the title of such association or of its members in the aggregate will not be bound by making the trustees of the association parties defendant to a proceeding for the enforcement of a mechanic's lien.—T. A. Miller Lumber Co. v. Oliver, 65 Mo. App. 435.

[j] (Mo. 1906) A valid judgment enforceable by execution against the property of an unincorporated association cannot be obtained in an action at law against the trustees of the property of the association.—Moore v. Stemmons, 119 Mo. App. 162, 95 S. W. 313.

[k] (N. Y. 1851) The general agent of an unincorporated association may bring an action in his own name, for the benefit of the association, to recover on a note held by it.—Habicht v. Pemberton, 6 N. Y. Super. Ct. (4 Sandf.) 657.

[l] (N. C. 1801) A suit cannot be filed in the name of a mere agent of an unincorporated association.—Marshall v. Lovelass, Cam & N. 217.

(152 Fed. 1022.)

WEEMS STEAMBOAT CO. OF BALTIMORE CITY v. PEOPLE'S STEAMBOAT CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1907.)

No. 662.

WHARVES—PUBLIC CHARACTER—MONOPOLY OF USE.

A wharf built on the bank of a navigable river, not in a city or town where there are a number of others, but at the terminus of public highways in the country, or at a small place, where it constitutes the only means by which the people of the community can reach the river and use the mediums of commerce navigating the same, and which was built for such use, or is being so used, is impressed with a public interest; and a single carrier cannot, by purchasing or leasing the same, convert it into private property, so as to have the right to exclude the public or other carriers from using it for the loading or unloading of vessels on the payment of reasonable wharfage.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

In Equity. On application for an injunction to restrain the use of certain alleged private wharves.

Injunction was refused by the court below at cost of complainant and the present appeal was then taken.

Digitized by Google

The statement and opinion filed below, and here reprinted from 141 Fed. 454, were in full as follows:

The complainant company, a corporation of the state of Maryland, the owner and operator of a line of steamers plying between the city of Baltimore, in the state of Maryland, and the city of Fredericksburg, in the state of Virginia, said route being from Baltimore down Chesapeake Bay to the mouth of the Rappahannock river, and thence up said river to Fredericksburg, filed its bill in this cause to enjoin the People's Steamboat Company, a corporation of the state of Virginia, the owner and operator of a competing steamer to that of complainant, from allowing its steamer, the Tourist, to use certain wharves, 13 in number, on the Rappahannock river, owned or leased by the complainant company, because, as alleged, said wharves were not public wharves, but the private property of the complainants. Upon presentation of the bill, a rule was awarded requiring the defendant to show cause why the injunction prayed for should not issue; and, upon its return, affidavits in favor of and against the motion were filed; and the court thereupon, before granting the injunction, directed a reference to a special master, with a view of ascertaining the status of the said wharves. A great mass of evidence was taken, and an investigation of the titles to the property made by the special master; and, in an elaborate and able report, he concluded that all of the said wharves were either owned in fee by the complainant company, or held by it under proper leases from the lawful owners thereof; and that said wharves, one and all, were the private property of said owners, and private, as distinguished from public wharves. Exceptions were filed to this report by the defendant company and fully argued before the court; and the question for determination is whether said wharves are, in point of fact, public or private wharves. If public, the defendant has the right to the use of them as contended; whereas, if private, such right does not exist.

The Rappahannock river is one of the ancient and important waterways of the commonwealth. The distance from its points of navigability at the city of Fredericksburg, to where it empties into Chesapeake Bay, is about 120 miles; and considerable commerce is conducted upon it; and the complainants and their predecessors have for a long number of years (40 or 50) operated a line of steamers from the city of Baltimore, over said route; and on said river are located some of the oldest villages and towns in the state, notably at two of the wharves in question, Rappahannock and Port Royal, the latter place being one of the oldest, as it was at one time one of the largest ports of entry, in the commonwealth, although now it has only some few hundred inhabitants. The complainants are the owners of six of the wharves under consideration, having acquired the same from time to time during the operation of their line of steamers; and they succeeded in leasing the remaining seven of said wharves, shortly before the institution of this proceeding, and after the defendant company inaugurated its line of steamers on said river. While the said 13 wharves involved in this proceeding by no means include all the wharves or stopping places for vessels on the river, it may be said that they embrace the important wharves from which the passenger and freight business is chiefly procured, in passing up and down the river; and that the business from said wharves is large. With possibly a single exception, these wharves are at the termini of public highways in the counties in which they are respectively built; the character of the business consists of passenger travel, and merchandise received over said wharves, consisting of the general products of the country; and they are the usual shipping places of persons living in the immediate neighborhood of the wharves, and of the inhabitants of the country for some distance in the interior. That, at said wharves, United States post offices are established, at which the mail of the people for the surrounding country is procured; and that, as to the wharves leased as aforesaid, the same were leased upon a rental of a commission of 10 per cent. of all freight charges and passenger fares collected by the complainant at said wharves, the owner of said wharves maintaining an agent there to assist in mooring the vessels of the complainants making landings there, and in receiving and forwarding freight therefrom; and at some of the wharves sail vessels from time to

Digitized by Google

time moor, and lade, and unlade, making proper compensation to the owners of the wharves for their use.

WADDILL, District Judge (after stating the facts as above). While the special master is doubtless correct in his findings as to the actual ownership of the property rights in said wharves, namely, that they are the individual property of the several owners thereof, and, as such, pass regularly by the laws of descent and purchase, it by no means follows that said wharves are private as against the public; that is, either the citizens desiring to use the wharves to reach the means of transportation upon and over said river, or owners of such methods of transportation plying the waters of said river; the obligation upon each being to render and pay to the wharf owner reasonable wharfage and charges for the use of his property, under such proper and reasonable regulations as might be imposed either by law or by the owner of the property.

Wharves belong to a class of property in which the public is concerned, and as to which the government has always reserved the right, as between its citizens, to regulate and control. This has prevailed in England from time immemorial, and in this country from its earliest colonization; that is to say, the government has exercised the authority to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc. And hence this class of property, when used by the public, becomes affected with a public interest, and it ceases to be juris privati only. As was said by Mr. Chief Justice Waite, in delivering the opinion of the court and discussing the subject under consideration, in Munn v. Illinois, 94 U. S. 126, 24 L. Ed. 77:

"This was said by Lord Chief Justice Hale more than 200 years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

The question of what is technically a public, and what a private, wharf may be matter of some doubt; but there should be no serious question in this case as to the wharves under consideration. The Supreme Court of the United States, in Dutton and others v. Strong and others, 66 U. S. 23, 32, 17 L. Ed. 29, had under consideration this precise question, as to when piers, landing places, and wharves were private, or became public wharves, although the property in such wharves remained in the individual owner; and in apt language said:

"And whether they are the one or the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure."

These wharves, it must be borne in mind, are not the landing places or piers of a line of steamers in a city, but mere wharves along the banks of a river in the country, in the main at the termini of public county

Digitized by Google

roads; and hence the means, and only means whereby the people of the community can reach the river and use the mediums of commerce navigating the same. These wharves were all built that they might be so used, and for the profit that was in the use; and they have been continually thus used, some of them yielding to the owners, because of the travel upon and over them by the public, with the complainant and others, a large return; and so long as they are thus used, as between the public and their owners, they are public, as distinguished from private wharves. Nor does the fact that the complainant does not charge wharfage eo nomine, in its transactions with its patrons, change the character of the wharves; since they built, used, and maintained them for the public generally, who used their wharves and their steamers, paying their passage and freight money, which includes wharfage; and they cannot thereby, whether actual wharfage is charged or not, either discriminate as between the public seeking to go upon and over the wharf, or public carriers seeking to lawfully ply the waters of said river. The complainant is a public carrier, using a public waterway; and it cannot, by the mere fact of not charging wharfage at a wharf used generally by the public, secure a right to prevent any part of the public from using the wharf upon equal terms with others. And least of all can they cut off a competitor lawfully engaged in the navigation of such waterway from the free use thereof, and the right to have and receive the patronage of the public lawfully using such wharf, upon making or proffering proper compensation therefor. It will be readily seen that, if the complainant could exercise such a privilege as this, it would be a simple thing for the owners of a line of steamers to acquire all the wharves on the river, and thereby subject the public to a monopoly from which there would be no escape, and deny to them the free use of the public waters of the commonwealth. If such a thing were possible, the continued improvement of rivers and harbors by the general government would quickly cease, and the commerce of the country receive a serious setback.

The question of private ownership of wharves is fully recognized in the case of Dutton et al. v. Strong et al., 66 U. S. 33, 17 L. Ed. 29, by the Supreme Court of the United States, in this language:

> "Undoubtedly, a riparian proprietor may construct any one of these improvements *for his own exclusive use and benefit;* and, if not located in a harbor, or other usual resting place for vessels, and, if confined within the shore of the sea or the unnavigable waters of a lake, *and it had not been used by others or held out and intended for such use,* no implication would arise, in a case like the present, that the owner had consented to the mooring of the vessel to the bridge pier." (Court's italics.)

That is to say, riparian owners can construct and maintain, for their own exclusive use and benefit, private wharves upon their property; and, as long as they so use them, they are not affected with a public interest; and a temporary use by another, by special arrangement with the owner, might not affect the character of such wharf. Transportation Co. v. Parkersburg, 107 U. S. 691, 699, 2 Sup. Ct. 732, 27 L. Ed. 584. But a general or habitual use thereof by persons other than the owner will relieve the property of its private character. No hardship would befall the owner of the private property by this interpretation, in that

Digitized by Google

it could or might be claimed that it was a deprivation thereof, and the appropriation of the same to public use without proper compensation.

This phase of the question was considered by the Supreme Court of the United States in the case of Munn v. Illinois, 94 U. S. 125, 24 L. Ed. 77, and the suggestion refuted; and in this same case, the court, at page 126, 94 U. S. (24 L. Ed. 77), speaking of the owner, said:

"He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

The owners of wharves have a complete remedy within their own hands, if, in point of fact, they be private, as distinguished from public wharves. They have the right to withdraw the use of their wharves entirely from the public. But they cannot allow the latter to use the wharves, or use them themselves in their business as public carriers for the public, and discriminate between them in their use.

In what has been said, no opinion is meant to be expressed upon any question affecting the ownership of wharves and piers in cities and towns of the commonwealth, or harbors or places where there may be more than one landing place, as entirely different considerations may determine a controversy arising over such property, and under such circumstances. The fact of the existence of a different rule as to wharves like the ones in question, along the banks of a river in the country, where they may be said to be the only means of communication by the public with the waterway, from those in the harbors of cities or towns, where there are not unfrequently many and other wharves and landing places for the landing and embarking of passengers and freight, has long since been recognized; and much can be said as to the necessity for, and the wisdom of, such distinction. The location of wharves in the country, the meandering of the river, the character of the river banks, the condition of marshes along the river courses, the fact that the forests and country along the river and adjacent to such wharves for long distances might not be opened up, would one and all tend to show the reason for the existence of a different rule. This fact was recognized by Sir Mathew Hale long ago; and the Supreme Court of the United States, speaking through Mr. Justice Bradley, referring to that learned jurist, in Transportation Co. v. Parkersburg, 107 U. S. 699, 2 Sup. Ct. 739, 27 L. Ed. 584, said:

"Whether a private wharf may be maintained as such, where it is the only facility of the kind in a particular port or harbor, may be questioned."

And in treating of this subject, Lord Hale, in his treatise De Jure Maris (Hargreaves, Law Tracts, 77), says:

"A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. * * * If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the king, or because there is no other wharf in that port, as it may fall out where a port is newly erected, in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are

Digitized by Google

affected with a public interest, and they cease to be juris privati only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest."

This quotation from Lord Hale has been referred to approvingly by the Supreme Court of the United States at least twice—in the case of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and Transportation Co. v. Parkersburg, 107 U. S. 699, 2 Sup. Ct. 739, 27 L. Ed. 584. Reference may also be had to Gould on Waters (3d Ed.) § 119; Barrington v. Commercial Dock Co. (Wash.) 45 Pac. 748, 33 L. R. A. 116, and cases there cited; Oregon Short Line v. Ilwaco Ry. & Nav. Co. (C. C.) 51 Fed. 611; Indian River Co. v. E. C. Transportation Co. (Fla.) 10 South. 485; Sherlock v. Bainbridge, 41 Ind. 35, 13 Am. Rep. 302.

The array of authorities cited by the complainant in support of its several contentions, and which largely treat of the rights of riparian owners to the status of wharf property in cities and towns, and ports where there are more than one wharf, and the title to private property in wharves, have been carefully considered by the court; and, while some of the cases apparently conflict with the views herein expressed, the court feels controlled by the authorities relied upon as the basis of this decision.

The conclusion of the court is that the injunction asked for should be refused, at the cost of the complainant.

St. George R. Fitzhugh and George W. Williams, for appellant.
William D. Carter, for appellees

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

PER CURIAM. A careful examination of the record impels us to an affirmance of the decree appealed from. The opinion of the court below has our approval.

(153 Fed. 129.)

BAER v. SLEICHER et al.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1907.)

No. 1,605.

1. COUNTERCLAIM—SUBJECT-MATTER—OHIO STATUTE.

A contractor for a government work in Ohio canceled the contract of subcontractors for an alleged breach, and took possession of the tools and materials of the subcontractors on the premises under a provision of the contract, and used the same in completing the work. The subcontractors, who were citizens of another state, having brought an action in replevin for such tools and materials in a federal court, the defendant therein filed a counterclaim for damages growing out of the breach of contract by the plaintiffs. *Held*, that such claim for damages was one "arising out of the contract or transaction set forth in the petition, as the foundation of the plaintiff's claim, or connected with the subject of the action," in such sense as to make it a proper counterclaim under Rev. St. Ohio 1906, § 5069, and therefore that the court had authority under section 5089 to order it docketed as a separate action, and had jurisdiction over the subject-matter and the persons of the defendants therein.

Digitized by Google

2. DAMAGES—BREACH OF BUILDING CONTRACT.

A contract to furnish the materials and labor for certain work on a structure provided that in case the contractor should fail to complete the contract in accordance with its terms the second party should have the right to recover any and all damages incurred by reason of said failure, and also to recover whatever sums might be expended in completing the said contract in excess of the contract price. *Held*, that upon such failure and the completion of the contract by the second party his recovery was not limited to the reasonable cost of such completion, to be determined by a jury, but that he was entitled to recover the actual amount expended by him in good faith in such completion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 307, 308.]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

N. S. Monsarrat, Jr., for plaintiff in error.

C. A. Seiders, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This suit was brought by John H. Baer, a resident of Toledo, and citizen of Ohio, surviving partner of Randolph & Baer, general contractors, against William Sleicher, Jr., and William N. Sleicher, partners under the firm name of the West Side Foundry Company, residents of Troy, and citizens of New York, to recover damages for a breach of contract. It appears that Randolph & Baer entered into a contract with the United States to furnish labor and material, and erect the Toledo Harbor Light Station, for the sum of $84,700. Thereafter Randolph & Baer entered into a contract with the West Side Foundry Company to furnish and erect the iron and metal work for said station for the sum of $15,600, the work to be completed by September 1, 1901. By an agreement made April 23, 1902, the West Side Foundry Company was given until October 1, 1902, to complete this work. It failed to do so by the stipulated time, but continued at work until about December 12, 1902, when Baer notified the West Side Foundry Company that its contract was canceled, giving the reasons, and thereafter assumed charge of the job, and proceeded to complete the iron and metal work, charging the West Side Foundry Company with its cost. It was for the cost of thus completing the iron and metal work, and for the damages resulting from the breach of contract by the West Side Foundry Company, that the petition was filed by Baer.

To this petition the defendants filed an answer on June 23, 1905, in which they set out: That on April 2, 1903, they commenced an action in replevin in the court below against Baer and the administrator of his former partner, Randolph, to recover the material and tools which had been left at the station and taken possession of and converted by Baer, which property, on the filing of proper affidavits, was delivered to them. That thereafter Baer filed an answer and counterclaim in which he claimed that the property replevined had been delivered to the said John H. Baer by said plaintiffs under the contract set up in said counterclaim and in its petition herein, and that the said counterclaim arose out of the transaction of the delivery of said materials and

Digitized by Google

property, and was connected with the subject of the plaintiffs' action, and damages for the breach of the contract on which the present action is founded. This counterclaim was demurred to by the present defendants, and, the demurrer being overruled, a reply was filed denying that the property had ever been delivered to Baer, or that the counterclaim arose out of the transaction of the delivery of the property. That thereafter the cause came on for trial, was submitted to the jury, and the jury found in favor of the plaintiffs therein, and judgment was rendered against the defendant Baer. During the trial testimony offered by Baer in support of his said counterclaim was excluded on the ground that his cause of action did not amount to a counterclaim, and before the final submission of the cause Baer was permitted to withdraw said counterclaim, and it was ordered by the court that the same be docketed and proceeded with without further process under section 5089 of the Revised Statutes of Ohio for 1906. After stating these facts, the answer submitted that, there being no counterclaim under section 5069 of the Revised Statutes of Ohio for 1906, there was no authority under section 5089 to docket the same as a separate action, and the court was without jurisdiction over the persons of the defendants.

A demurrer to this answer, or plea in bar, was sustained and leave given to answer. The answer, after a preliminary protest against the jurisdiction of the court over the persons of the defendants, goes on to present in detail their defense to the action upon its merits, and along with the same incorporates a cross-petition in which they seek to recover a large amount of money for extra work and material furnished under the contract. A reply was filed to this answer and cross-petition, and the case went to trial before a jury, which returned a verdict in favor of the plaintiff and for $1,000 and costs. Both the defendants below and the plaintiff seek to set aside this judgment, the defendants on the ground that the court below was without jurisdiction over the persons of the defendants, and the plaintiff on the ground that the court erred in its rulings upon the trial.

1. The defendants make the point that after the court held there was no counterclaim under section 5069 of the Revised Statutes of Ohio for 1906, in favor of Baer, it was without authority, under section 5089 of the Revised Statutes of Ohio for 1906, to order this alleged counterclaim to be docketed as a separate action, and therefore was without jurisdiction over the persons of the defendants in the action thus wrongfully docketed. But we are satisfied the court below was wrong in holding that there was no counterclaim under section 5069 in favor of Baer. This section of the Ohio Code provides that "a counterclaim is a cause of action existing in favor of a defendant, and against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." The right claimed by Baer to recover damages for the breach of the contract with the West Side Foundry Company was so connected with the material and tools replevined by the latter that it came within the definition of a counterclaim under the section mentioned. It arose out of the contract or transaction relied upon by the West Side Foundry Company, and

Digitized by Google

was so connected with the subject of their action as to make it properly a counterclaim. For this reason the court below had authority, under section 5089 of the Revised Statutes of Ohio for 1906, to order it to be docketed as a separate action, and therefore had jurisdiction over the persons of the defendants and the subject-matter of the action now before us on error. Clement v. Field, 147 U. S. 467, 13 Sup. Ct. 358, 37 L. Ed. 244; Morgan v. Spangler, 20 Ohio St. 38.

2. Having thus disposed of the question of jurisdiction, the case, so far as it is necessary for us to consider it, turns upon the proper construction of that portion of the contract which defines the limits of recovery to one who rightfully cancels the contract, and under its terms completes the job. Under the present contract, he was clearly entitled, in addition to certain damages, to the cost of completing the work. This did not mean the reasonable, but actual, cost. If it appeared from the testimony that he paid in good faith certain sums of money for material and labor to complete the job, he was entitled to recover such sums, whether the jury thought they were reasonable or not.

The contract provided:

"It is further understood and agreed that in case of failure of the party of the first part, the West Side Foundry Company, to complete this contract as specified and agreed upon, that the said party of the second part, Randolph & Baer, shall have the right to recover any and all damages incurred by reason of said failure by the party of the first part, and shall also have the right to recover whatever sums may be expended by the party of the second part in completing the said contract in excess of the price stipulated, to be paid by the party of the first part for completing the same."

Referring to this portion of the contract, the court charged the jury as follows:

"Now, gentlemen, if, under these instructions, you find that the plaintiff was entitled to cancel this contract on the 12th day of December, you will proceed to inquire what, under the proof, he is entitled to recover from the defendants. I cannot be of much service to you in that respect. If he is entitled to recover, he is entitled to recover the reasonable cost of completing the contract, not the unreasonable or extravagant cost, but only the reasonable cost of it."

This portion of the charge was specially excepted to. Under it, as appears from the record, testimony was relied upon tending to lead the jury to believe that certain items charged against the defendants for the cost of completing the work were unreasonable and extravagant, and should be rejected or reduced, although paid by the plaintiff in good faith. Thus it was left to the jury to determine, as to each particular item, whether the cost should be recovered or not; in other words, no matter if the item cost what Baer charged for it, and no matter if he had paid the price thus demanded, and no matter if he could not have obtained the material or labor for less money, nevertheless, if the jury, in its discretion, should determine that the cost of the material or labor was extravagant, it might reject or reduce the item.

We do not understand that the contract vests any such power in the jury, or leaves the contracting party to such a doubtful and uncertain remedy under the contract. A man who contracts to do certain work must perform his contract, and, if he fails to do so and leaves the contract uncompleted, the other party is given the right to cancel the contract and complete the work. In case the contract is thus annulled,

Digitized by Google

"the party of the second part [meaning in this instance Baer], shall be thereupon authorized, if an immediate performance of the work or delivery of the materials in their opinion is required by the public exigency, to proceed to provide for the same by open purchase or contract, and the party of the first part shall remain liable to the party of the second part for the damages occasioned to them by the said non-compliance, delay, or negligence."

We have already referred to that part of the contract which provides:

"That in case of failure of the party of the first part to complete this contract * * * that the party of the second part shall have the right to recover any and all damages incurred by reason of said failure, * * * and shall also have the right to recover whatever sums may be expended by the party of the second part in completing said contract in excess of the price stipulated to be paid to the party of the first part for completing the same."

The view we take is that the purchase of the material and labor is left to the party of the first part. It may be made either "by open purchase or contract." If it is made in good faith, the sums thus expended to complete the work become a proper charge against the party of the second part. The sole question is whether such sums have been expended in good faith by the party of the second part in completing the work. If they have been, it is not for the jury to say that they are unreasonable or extravagant. The party of the first part in completing the work, occupied substantially the position of an agent for the party of the second part, and did not guaranty the wisdom of the purchase of labor or material.

The judgment is reversed, and the case remanded for a new trial.

(153 Fed. 133.)

BEEBE et al. v. WELLS.

In re FEDERATION SHOE CO.

(Circuit Court of Appeals, First Circuit. February 13, 1907.)

No. 666.

BILLS AND NOTES—CONSIDERATION—FORBEARANCE TO SUE.

The P. S. Company, being insolvent, instead of liquidating, formed a new corporation, which subsequently became bankrupt, conveying a substantial portion of the assets of the P. S. Company to the new corporation, in payment of capital stock. Claimant, a creditor of the P. S. Company, had been demanding payment, and, after the reorganization, proposed that the balance of the P. S. Company's assets be transferred to the new corporation, in consideration of certain notes of the latter which should be transferred by the new corporation to claimant as security for its debt, threatening otherwise to sue to wind up both corporations. The notes were executed as agreed, but no additional property was transferred from the P. S. Company to the bankrupt. *Held*, that claimant's promise to forbear suit against both corporations constituted a sufficient consideration for the bankrupt's notes.

Appeal from the District Court of the United States for the District of Massachusetts.

On appeal from an order affirming an order of a referee disallowing the claim of Lucius Beebe & Sons against the estate of the Federation Shoe Company, a bankrupt.

Digitized by Google

The following is the opinion of Dodge, District Judge, in the District Court:

The notes upon which the claim of the petitioners for review is based are dated March 20, 1902. They are payable to the petitioners' order, and signed: "The Federation Shoe Company, by H. M. Cushman, Treas." The bankrupt was a corporation under the laws of Massachusetts. Cushman was its treasurer, and signed the notes, which were then delivered to the petitioners.

The Federation Shoe Company was adjudged a bankrupt October 17, 1902, upon an involuntary petition filed against it on September 26, 1902. The petitioners' claim against it upon these notes was rejected by the referee, and upon their petition for review a certificate was filed June 15, 1903, which was recommitted to the referee April 17, 1905, to hear further evidence. The referee's decision after the hearing on recommittal was the same as at first, and the petitioners now seek to review that decision. The question certified by the referee (March 24, 1906) is: "Are the notes offered in proof good and valid notes and entitled to be proved against the estate of the bankrupt?" By the findings of fact and opinion which accompany the referee's certificate it appears that he answered this question in the negative, because on the facts found he ruled that the notes were without consideration, and that the petitioners are not bona fide purchasers of the notes for value without knowledge of the want of consideration.

No reason appears for questioning any of the findings of fact which the referee has made, and they are therefore approved and adopted.

He has declined to make certain further findings of fact requested by the petitioners. These requests, and the referee's decision upon each, appear in his report of findings, being numbered 4, 5, 6, 7, and 8. As to requests 4 and 5, it was for the referee to determine how far Small's statements could be relied upon. His refusal to rely upon them is supported by the undisputed facts appearing regarding Small, and nothing has been shown which warrants the court in holding that the refusal was wrong. As to the request numbered 6, also, it cannot be said that the referee was required by the evidence before him to make the finding requested. I am unable, upon the evidence before the referee, to see any reason for doubting the correctness of his qualified finding made upon the request numbered 7.

In refusing the request numbered 8, the referee decides against the petitioners' contention that a good consideration for the notes is found in their forbearance to bring a suit in equity for the purpose of following those assets of the Pray-Small Company which that company had conveyed to the bankrupt in exchange for $30,000 in its stock. Such a suit would, it is claimed, have resulted in avoiding the conveyance referred to as fraudulent, and in a marshaling of the bankrupt's assets for the purpose of paying therefrom the indebtedness due the petitioners from the Pray-Small Company; and that such would have been the result of the suit, had it been brought, must be granted, in view of the findings that the conveyance was in fraud of the petitioners' rights as creditors of the grantor and gave them the right to avoid it. The petitioners, however, fail to show, in my opinion, that the notes were given in consideration of their forbearance to bring such a suit.

No such suit was brought, it is true, but it does not follow, from the mere fact that the petitioners did not bring it, that the notes were upon consideration of their forbearance. There must have been an express or implied agreement to forbear between them and the bankrupt. Boyd v. Freize, 5 Gray (Mass.) 553. No express agreement is claimed, and the evidence does not show an implied agreement.

The actual consideration for which the notes were, in fact, given must be ascertained from the petitioners' letter to Small dated March 20, 1902. The notes bear the same date, and, as the referee has found, were made by the treasurer of the bankrupt corporation, at Small's request, upon receipt of the letter referred to. Not only does that letter specify, as the consideration contemplated for the proposed notes, the purchase which it suggests by the bankrupt of more of the Pray-Small Company's assets, and not only does it omit any statement or intimation that the petitioners will attack the former conveyance by that company as fraudulent unless the proposed notes

Digitized by Google

are given, but it states that the assets of that company were undoubtedly sufficient, when that conveyance was made, to pay all its debts. This statement is inconsistent with the findings now made by the referee, it is true; but it is nevertheless inconsistent also with the contention that the petitioners were, when the notes were given, threatening the bankrupt with a suit to avoid the former conveyance, as is also the further statement in the letter that there seems to be no good reason why the Pray-Small Company should not make a further conveyance of its assets to the bankrupt.

Nothing which may have been said or written before March 20, 1902, to Small or to the bankrupt by the petitioners or their counsel, seems to me sufficient to affect the above conclusion, because the letter of that date, which as the referee has found was drafted by the petitioners' counsel, and must be considered as written in view of everything which had been previously discussed, expressly states that the previous request for payment is "somewhat modified," and thereupon proceeds as above stated. The position stated in the letter must be considered as the attitude of the petitioners upon which the parties acted in giving and receiving the notes, to the exclusion of anything inconsistent therewith involved in what may have passed between them before the writing of the letter. It is indeed said in the letter that the petitioners "do not care to unnecessarily cripple your new company by requiring a liquidation of the affairs of both companies," etc. But since the other statements made in the letter are, as has been indicated, wholly inconsistent with the theory that it was in the petitioners' power to accomplish anything of the kind, I am unable to consider this language as manifesting any intent on their part to make the attempt.

The proposed notes were, according to the letter, to be given by the bankrupt to the Pray-Small Company, which company was then to deliver them to the petitioners as collateral security for their claim against it. This course was not, in fact, followed. The notes were, instead, made payable to the petitioners direct, indorsed by the Pray-Small Company, and thus indorsed delivered to the petitioners.

The petitioners, however, accepted this arrangement as the equivalent of that proposed in the letter, and I see nothing, therefore, in the fact that it was a departure to the above extent from the arrangement proposed which requires any modification of the conclusions herein reached.

The separate written inquiries addressed by the petitioners' counsel on April 23, 1902, after the petitioners had received the notes, to the Pray-Small Company and the bankrupt, and the replies thereto received from each, afford further confirmation of the strongest character to the view that the only consideration for the notes was understood by the petitioners and the bankrupt to be property sold by the Pray-Small Company to the bankrupt. The substance of these inquiries and replies is set forth in the referee's report. The petitioners' understanding is thus definitely set forth in the inquiry addressed to the bankrupt: "I am advised that in payment of these notes (the Pray-Small Company notes then held by the petitioners) the Pray-Small Company has given to L. Beebe & Sons certain notes made by you and indorsed by the Pray-Small Company, which were given by you to Pray-Small Company in payment of property which you purchased of Pray-Small Company." If any other consideration, or if a different consideration, was then in the petitioners' minds, it is difficult to believe that all reference to it would have been here omitted, considering the circumstances under which this inquiry was written and the purpose for which it was written.

Lastly, the proof of claim in these proceedings, sworn to December 5, 1902, by one of the petitioners, contains the explicit statement, "These notes were given by the bankrupt for merchandise and assets sold to them by the Pray-Small Company, and Pray-Small Company transferred them to creditors in payment of indebtedness to the deponents," and no reference whatever is made in it to any other or any different consideration for the notes.

There never was, in fact, any such purchase by the bankrupt from the Pray-Small Company, as suggested in the letter of March 20, 1902, or as referred to in the letters of inquiry of April 23, 1902. Small's answers to those inquiries were untrue. Unless, therefore, the petitioners were misled by the bankrupt into the belief that it had, in fact, bought merchandise of

Digitized by Google

the Pray-Small Company and had given these notes in payment therefor, the referee's ruling must stand.

The referee has found on the evidence before him that the petitioners did not believe Small's statements as to the value of the Pray-Small Company's assets, but knew them to have been false, and, in view of Small's control of both companies, the petitioners' knowledge that he so controlled them, their knowledge that the bankrupt's notes were, in fact, given in payment of the debt of another, the indications afforded them from the circumstances that no such sale and purchase could have been made by proper corporate action on the part of both companies, and the indications afforded them from their knowledge of the affairs of both companies that such a sale and purchase would at best have been of no benefit to the bankrupt, the referee was of opinion that the petitioners were bound to see to it, before they acted upon Small's statements, that the sale and purchase had been actually made. With these conclusions I agree. The petitioners, in my opinion, should have been put on their guard by the facts shown to have been within their knowledge or the means of knowledge at their command. These facts were of such a character that they must be regarded as having acted at their own peril in taking the notes, and cannot claim to have been misled. The notes offered in proof, therefore, are not good and valid notes and entitled to be proved against this estate. The referee's order disallowing them is affirmed.

Boyd B. Jones (Hurlburt, Jones & Cabot, on the brief), for appellants.

Elisha M. Stevens (William H. Niles and Niles, Stevens, Underwood & Mayo, on the brief), for appellee.

Before PUTNAM and LOWELL Circuit Judges, and ALDRICH, District Judge.

LOWELL, Circuit Judge. This is an appeal from a judgment of the District Court disallowing the appellant's proof of claim against the bankrupt estate. The claim is based upon promissory notes given to Beebe, the appellant, by the bankrupt, the Federation Shoe Company, and indorsed by another corporation, the Pray-Small Company. The referee disallowed the proof, and on appeal his order was sustained by the learned district judge, on the ground that the notes, being given for the debt of another, were without consideration, moving to the bankrupt, and that the creditor did not purchase them in good faith, believing that a consideration for them existed. Morawetz on Private Corporations, § 423. The creditor contends that the notes were given by the bankrupt for value, and, if he can establish this, his claim must be allowed.

The Pray-Small Company, a corporation controlled by Small, owed Beebe on promissory notes and on account about $10,000. The corporation was insolvent. In order to continue its business unhampered by its creditors, Small organized the Federation Shoe Company, the bankrupt in this case. A large part of the property of the Pray-Small Company was transferred to the bankrupt in exchange for its corporate stock. After this transfer, Beebe sought, through his counsel, Jones, to collect from the Pray-Small Company the amount due on the notes, or to obtain further security. Jones had an interview with Small, in which Small described the condition of the two companies. Jones thereupon asked him to transfer to Beebe, as collateral security for the debt, the accounts receivable of the Pray-Small Company. This Small refused to do. Jones then suggested that the Pray-Small

Digitized by Google

Company sell to the bankrupt a part of its property yet remaining untransferred, for which the bankrupt should give its promissory notes to the Pray-Small Company, and that the Pray-Small Company should indorse these notes to Beebe. This transaction in effect would give to Beebe an obligation of the bankrupt as security for the indebtedness of the Pray-Small Company. This, also, Small refused to do. Jones further testified that he told Small:

"I considered that this new corporation and the conveyance of the assets to this new corporation was for the purpose of continuing the business of the old corporation, or enabling the old corporation, the people interested in it, to keep along the business, and that it was in fraud of creditors, that they had no right to do it, that we had a right to have both companies liquidated and have a marshaling of the assets, and that we should do it. I told him we should not permit the business to continue as it was continuing at the present time, and that, unless we got payment or security, we would close them both up. Then I advised him to talk with Mr. Beebe about it."

"I said I would force both companies into liquidation and have the assets marshaled, unless we had security or payment, and I suggested, myself, this method of their giving us security. The idea of security was abandoned later on, because it was just as well to have the notes with the same maker and indorser as to have the notes of the Pray-Small Company with these notes as collateral. It made no difference. We had the liability of each company for the whole indebtedness."

What was the negotiation between Small and Beebe does not appear in evidence. Beebe was not called. Small had absconded. A few days afterwards Beebe told Jones that he had not made much progress with Small. Jones then wrote a letter, which Beebe signed as follows:

"Boston, Mass., March 20, 1902.

"L. Linn Small, c/o Pray-Small Company, Haverhill, Mass.—Dear Sir: Since seeing you I have given the matter of your indebtedness to our firm pretty careful consideration, and am inclined to somewhat modify my request for payment. The situation is substantially this: Pray-Small Company owes L. Beebe & Sons on open account $3,182.02 and notes amounting to $6,667.82 together with interest on both sums.

"The assets of Pray-Small Company at the time of the formation of the Federation Shoe Company were undoubtedly sufficient in value to pay all of its indebtedness; but such payment would have required the liquidation of its business. Instead of liquidating, Pray-Small Company formed a corporation, to wit, the Federation Shoe Company, to which it conveyed a substantial portion of its assets in payment of capital stock; and this capital stock is now held by Pray-Small Company.

"From your standpoint it was desirable for you to continue on in business by this method. From our standpoint a liquidation of the business of the company was more desirable. We do not care to continue to be creditors of a corporation which has ceased to do business; but, on the other hand, do not care to unnecessarily cripple your new company by requiring a liquidation of the affairs of both companies, a marshaling of the assets, and the payment of our claim in cash. As you say it would be for the mutual benefit of both companies that the Federation Shoe Company should purchase some more of the assets of Pray-Small Company on reasonable terms, there seems to be no good reason why such purchase should not be made, and payment could be made in the notes of the Federation Shoe Company. We would accept the notes of the Federation Shoe Company as collateral security for the payment of our claims, said notes to be as follows:

"$1,500 in four months from date; $500 in five months from date; and $500 payable at the expiration of each and every month thereafter until the whole amount is paid, interest at five per cent.

"We feel that this proposition is an exceedingly liberal one on our part and one of which you should be glad to avail yourself. In conclusion, in

Digitized by Google

order to avoid any possible misapprehension, I may add that we shall not allow our claim to stand longer in its present form, and must ask you for early and definite information as to your intentions in the matter.

"Yours truly."

About April 20th Jones received the notes offered for proof, signed by the bankrupt and indorsed in blank by the Pray-Small Company. On his inquiry, he was informed by Small that the property mentioned in the letter of March 20th had been transferred to the bankrupt. The old notes of the Pray-Small Company were thereupon surrendered. Beebe contends that the bankrupt received value for the notes, to wit, an implied agreement that Beebe would not carry out his threat to liquidate both companies. The trustee contends that this was no part of the consideration moving to the bankrupt, but only the merchandise which was to be turned over by the Pray-Small Company. In fact, there was no transfer of merchandise, if any merchandise existed. An agreement not to prosecute a doubtful claim is a thing of value, and if Beebe made such an agreement, and if the agreement was the consideration of the notes in whole or in part, the trustee does not dispute that Beebe is entitled to share in the distribution of the bankrupt's estate.

Taking all the facts together, we are of opinion that the creditor's contention is well founded. We attach particular importance to the purpose expressed by Jones in his interview with Small and reiterated in the letter of March 20th. We accept his language as establishing his bona fide intention to institute proceedings in liquidation in order to protect his client's interests. It was urged at the argument that no agreement to refrain from legal proceedings was made by Beebe; but by his whole conduct, by the surrender of the old notes, and by the taking of new notes in their place, Beebe impliedly contracted to forbear and to abandon his proposed proceedings in liquidation. Had he instituted proceedings in equity to liquidate the two corporations before their notes fell due, this implied agreement would have been a sufficient defense to his suit. Had he sought the same result by proceedings in bankruptcy against the Pray-Small Company, the Federation Shoe Company might have restrained him from thus breaking his agreement. If there was a valid contract by Beebe not to proceed against the two companies, we have little difficulty in holding that it was a consideration for the execution of the notes by the bankrupt. Doubtless, a transfer of property from the Pray-Small Company was intended also as a consideration moving to the bankrupt for its signature to the notes; but we hold that this transfer was conceived and used by the parties as a method of strengthening the notes, while the implied agreement not to sue remained the principal consideration.

As value passed from Beebe to the bankrupt in part consideration for the notes, it follows, as above stated, that the creditor must prevail. We need not consider the other questions argued at the hearing arising from the failure of the Pray-Small Company to turn over any property to the bankrupt.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to allow the appellants' proof of claims; and the appellants recover their costs of appeal.

Digitized by Google

(153 Fed. 139.)

GLOUCESTER ELECTRIC CO. v. DOVER.

(Circuit Court of Appeals, First Circuit. February 18, 1907.)

No. 683.

1. ELECTRICITY—INJURY FROM LIVE WIRE—ACTION—ISSUES.

In an action by a telephone lineman against an electric light company to recover for a personal injury received by plaintiff from contact with an uninsulated part of a wire strung in close proximity to a telephone pole on which plaintiff was working, the question at issue is not one of assumption of risk, but of due care and reasonable inspection on the part of defendant in relation to its wire, and of due care on the part of plaintiff in the manner of doing his work in view of the known danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, §§ 6–11.]

2. SAME—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

Plaintiff, who was a telephone lineman, was directed to climb a pole to assist in stringing a wire thereon. Defendant electric company maintained a highly charged electric light wire which passed within four inches of the pole, and on the side nearest the pole the insulation had been worn or burned off. There was already one man on the pole above such wire, and plaintiff testified that he looked at the wire from the ground and the insulation appeared to be all right. He went up on the opposite side, and at the time he reached the wire the pole was swayed, apparently by some action of the man above, and his hands came in contract with the exposed wire, resulting in his injury. *Held*, that such evidence did not warrant an inference of negligence on his part as matter of law, but such question was properly one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 11.]

3. NEGLIGENCE—ACTION—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

On the trial of an action for a personal injury, the charge of the court with respect to the question of contributory negligence *held* erroneous, in that it tended to lead the jury to determine the question of due care with reference to the particular plaintiff and his own situation and observation, and not by the standard of what a man of ordinary prudence would have done under the same circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 382–394.]

In Error to the Circuit Court of the United States for the District of Massachusetts.

John Lowell and James A. Lowell, for plaintiff in error.
William A. Pew, Jr., for defendant in error.

Before PUTNAM, and LOWELL, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. At the time of the injury complained of the Gloucester Electric Company, the defendant below, maintained an electric lighting system in and about the city of Gloucester, and Joseph R. Dover, the plaintiff below, was an employé of the New England Telephone & Telegraph Company, which maintained a system of wires in the same locality.

At the place of injury on East Main street there were two poles, one belonging to the telephone company, and the other to the electric company, and the poles were 8 or 10 feet apart. The defendant's pole

Digitized by Google

upon its arms and other appliances carried several insulated electric light wires, with a current of something like 2,550 volts. The telephone pole carried certain fire-alarm wires belonging to the city of Gloucester, and four bare iron wires and one cable of its own, and a second cable was being strung upon the telephone pole at the time of the injury. It was in connection with the stringing of this cable that the injury was sustained by the plaintiff. These poles are spoken of in the record as having a "street side," and a "field side," meaning, of course, that one side faces the street, and the other the field. The wires upon the two poles at this point were running in the same general direction, and the defendant's wire which caused the injury was about 20 feet from the ground, and passed the telephone pole on its street side 4 inches from it. The cable being strung upon the telephone company's pole was to be attached at a point above the electric wire in question. The electric wire which caused the injury was bare of insulation for 3 or 5 inches on its side next to the telephone pole, and there was a charred rut or depression, 3 or 4 inches long and something like a half inch deep, across the street side of the pole opposite the wire at the point of broken insulation. The plaintiff knew in a general way of the danger of live wires, and had been cautioned about them, and he as subforeman had told men under him to be careful and look out for live wires; but there was no evidence that he actually knew that the insulation was broken on the wire in question at the time of the injury. Dover had been working on a nearby pole, and was ordered down to relieve a kink in the cable, and it became necessary in the prosecution of the work for him to ascend the pole in question to a point above the defendant's wire which caused the injury. One Gillis was on the pole above him at the time. Before starting, the plaintiff looked up the pole to see if everything was clear so he could get up. He saw the location of the wires, and, among other things, that one of the electric wires was within 4 or 6 inches of the pole he was to climb, and, on being asked about the insulation, he said it looked to be all right. Gillis, who ascended the pole before him, testified that he supposed that they were electric wires and kept away, that in going up the pole opposite the wire he saw the break in the insulation, and in coming down he saw where the wire had rubbed against the pole and burned it.

It is pointed out by one side that there was considerable evidence tending to show that this break in the insulation, and particularly the charred mark on the pole, could be seen from the middle of the street some feet away, while it was suggested by the other side that such a mark would more readily catch the eye of one standing some distance from the pole than of one who was standing at its base.

The defendant claims, first, that, though Dover was working for the telephone company, the liability of insulation of electric wires to get out of repair is so well understood, and the danger is so far within the knowledge of an experienced lineman, that it should be held that he assumed the risk or hazard incident to the defendant's wire being maintained in proximity to those of the telephone company, for which he was working.

Digitized by Google

We need not inquire whether the doctrine of assumption of risk, which, in its general acceptation, applies to cases between employer and employé, and involves the idea of implied contract of assumption, might, under some conditions, be extended to a case in which the injury results from a careless condition of things caused by the negligence of an outside party in respect to an outside business, because there is nothing in the nature of the plaintiff's contract with the telephone company, or in the character of the work, so far as shown by the record, which would warrant the application of the doctrine of assumption of risk against the plaintiff and in favor of the defendant.

We think it a question of due care. So far as the defendant is concerned, it is a question of due care and reasonable circumspection in respect to the oversight of wires known to be dangerous when out of repair in a situation where it is the duty and the right of others to go in the prosecution of their work, and, so far as the plaintiff is concerned, a question of due care in the manner of doing a rightful work in the line of duty, in a situation which he knows necessarily involves some hazard. Knowledge that wires are liable to get out of repair, and when out of repair that they are dangerous to life, is something entering into the question of care as it applies to both parties.

The defendant's second position is that the plaintiff's case is controlled against him by contributory negligence, and that it was so unquestionably careless for a man who knew the liability of insulation to get out of repair, and the resulting danger, to merely look and then voluntarily bring himself into contact with a wire without the safeguard of a safety belt, that contributory negligence should be ruled as a matter of law.

We do not think the negligence so clear as to warrant this. The plaintiff knew that one man had ascended the pole before him; and when he was called upon to ascend the pole and do something in the line of his work, he looked and saw the proximity of the wire to the pole which he was to ascend, and testified that it seemed all right. He may, without thinking much of insulation, have meant by this that he thought he could climb the pole without touching the wire, because he said he went up on the field side, sliding his hands up the pole, and that he felt a sway of the pole as though the men had given a jerk and let up quick, and that was the last he remembered. If it were clear that he had seen the break in the insulation, or that he had climbed the pole and got in contact with the wire, without any intervening cause like the swaying of the pole, it would be quite a different thing. There is no evidence that he saw the lack of insulation. It is only argued that he ought to have seen it. This being so, and the unforeseen swaying of the pole being the probable cause of the contact, it reasonably, we think, became a question for the jury whether, under all the circumstances the plaintiff exercised the care of a prudent man in attempting to do what he did.

The defendant's third point is that, if the question of the plaintiff's care is one for the jury, it was not submitted under proper instructions, and upon this point we are compelled to hold with the defendant.

It is quite apparent, from the correct statement of the principle by

Digitized by Google

the learned judge upon the motion to set aside the verdict, that he had in mind the rule under which questions of care in respect to a given situation are submitted to a jury; but we think he failed in his instructions to convey to the jury a full understanding of the rule which should have governed them in their deliberations in respect to the proper standard of care and in respect to its application to the plaintiff. The effect of the instructions, we think, was to lead the jury to determine the question of the plaintiff's due care by reference to men of the character of the plaintiff and with reference to his own situation and observation, rather than by reference to the standard afforded by the man of ordinary prudence. Thus the learned judge said:

"I think you should take, gentlemen, this particular pole and form a judgment. How suspicious a place was it? How dangerous a place would it appear to the ordinary observation of a man of this character? How suspicious would it appear to a man of that kind? Was he fairly warned by the mere look of that place that there was danger that the insulation might be off, or that he was called upon to inspect for lack of insulation? Is the lack of insulation—is a bare spot on the wire—a thing of such common occurrence, gentlemen, on poles of this description, that men should always invariably inspect it and always make a close inspection?"

The last words quoted, we think, led the jury to understand the real issue in the case to be, did due care require the plaintiff to make a "close inspection" of the pole? A misleading standard of due care was thus suggested, which, so far as appears by the record, was not sufficiently corrected by other instructions.

Under the instructions, we think the jury would naturally turn the case in their own minds upon the situation and the particular man in question, and upon the question whether such a situation always requires close inspection. We are unable to find anything in the instructions which would convey to the jury the idea that the plaintiff's care should be determined with reference to the question as to what men of ordinary care and prudence would have done under the circumstances. The plaintiff's negligence, if there were negligence, would consist in the failure to use such care as a person of common prudence similarly situated would exercise. The question of ordinary caution in carrying on dangerous work, or the question of ordinary care and prudence, must be determined with reference to what men of ordinary prudence would do under the circumstances. Similarly situated and under like circumstances, of course, includes the idea of men of similar knowledge and experience; and ordinary care means such care as such men would ordinarily exercise in such a situation as the plaintiff was in.

The reason for this rule, quite likely, is found in the idea that greater security resides in an impersonal standard than in the best attempt of jurors to decide upon a particular personal aspect. In the one view, the jurors are bound to hold the plaintiff's rights subject to the standard of care which men of ordinary prudence would exercise, while in the other the jury would be relieved from that standard, and feel at liberty to say, "Well, he probably thought it was all right, or perhaps he did not think," or, "It cannot be reasonable that men should always and invariably make a close inspection." In the one aspect there is a standard; in the other there is no standard for measuring the care.

Of course, it stands to reason, under the rule of ordinary care, that

Digitized by Google

the jury must consider the entire situation. The knowledge of the dangerous elements involved, the duty to enter the field of hazard, where the dangers cannot always be seen, where the care of a reasonable man may or may not discover the danger of contact if things remain as he sees them, and the probability that danger would have been averted but for the intervention of some unforeseen force which precipitates the danger, are all things to be considered. Care cannot be measured in degrees applicable to a particular plaintiff in a particular situation of hazard. Due care in a particular situation can only be ascertained upon inquiry as to what men of ordinary prudence would have done in a situation like that in which the plaintiff was involved. This idea was not clearly brought to the attention of the jury.

The judgment of the Circuit Court is reversed, and this case is remanded to that court, with directions to set aside the verdict and for further proceedings not inconsistent with this opinion; and the plaintiff in error recovers its cost of appeal.

(153 Fed. 143.)

BROWN et al. v. WILMORE COAL CO.

(Circuit Court of Appeals, Third Circuit. April 22, 1907.)

No. 14.

MINES AND MINERALS—GRANT OF MINING RIGHTS—FORFEITURE BY ABANDONMENT.

Defendant, for a nominal consideration expressed therein, obtained a large number of contracts, denominated "leases," from owners of land, conveying to him the coal and other minerals under such land, with the right to mine the same for 99 years and of renewal in perpetuity. By the terms of the contracts he was to render an account to the grantors and pay royalty at specified rates whenever any coal or other mineral was mined. *Held*, that such contracts imposed obligations upon defendant, as well as vesting him with rights, a mining enterprise being clearly contemplated thereby, and that where he did not in fact intend to prosecute such enterprise, and took no steps toward it, and paid no royalties, through a period of more than 20 years, during which coal was extensively mined in the vicinity, his rights were lost by abandonment, without regard to his actual intent to retain the same, and an owner in possession under subsequent conveyances from the same grantors was entitled to maintain a suit in equity to cancel the contracts as clouds upon its title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 189, 190.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 147 Fed. 931.

H. Snowden Marshall, for appellants.

D. L. Krebs and John G. Johnson, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. The Wilmore Coal Company exhibited its bill for relief from a cloud upon title against J. Willcox Brown and the New Amsterdam Coal Company in a court of common pleas of the state of Pennsylvania. The defendants having been duly served,

Digitized by Google

the suit, at their instance, was removed into the Circuit Court of the United States for the Western District of Pennsylvania, where, after hearing upon pleadings and proofs, a decree was entered in favor of the complainant, and the defendants appealed.

The general facts have been clearly set forth by the learned judge of the court below (147 Fed. 931), and we adopt his statement of them, as follows:

"In the years 1878 and 1880 the defendant J. Willcox Brown, a resident of Baltimore, Md., secured a large number of mining leases, aggregating about 16,000 acres, in different tracts, of various sizes, in Somerset county, Pa., as well as a like number in adjoining counties of Indiana and Cambria, 19 of which, of the Somerset lot, covering some 2,400 acres, are involved in the present suit. These leases were indentures under seal, and severally undertook, for the consideration in some cases of $5, and in some cases of $10, to grant, bargain, and sell to the said J. Willcox Brown, his heirs, executors, administrators, and assigns, 'all the iron ore, coal, cement, and fire clay, and all other minerals of every kind,' under the different tracts described, 'including the privilege of boring any number of wells and taking therefrom, by such means as are or may be most practicable, petroleum, carbon, or coal oil; also any salt water that may be found on the premises and manufacturing the same into salt,' together with the full and exclusive right, liberty, and privilege of mining, taking, and carrying away the said iron ore and other minerals, and of using such stones, earth, and water as might be necessary or required for conducting the mining operations. A few acres were reserved around buildings, and enough coal for the grantor's own use, and in some cases such as he might sell to his neighbors. The leases were to run for 99 years; the grantors covenanting at the end of that time to execute other leases of like tenor, for a similar term, renewable forever. In consideration whereof, it was agreed by the grantee that on the expiration of every three months, whenever any ore or other minerals were mined, quarried, or otherwise reduced to possession and removed from the premises, he would render to the grantor, his heirs, executors, and assigns, a true and correct account thereof; for every ton of coal, cement, fire clay, or other minerals than iron, five cents; and for every 100 barrels of petroleum or coal oil, and every 100 bushels of salt, 5 per cent. of the net profits. The leases were duly acknowledged and put on record in the office for recording of deeds in Somerset county, Pa., in July, 1880. A copy of one, as a type of all, although they differ in some minor particulars, is reproduced in the margin.[1]

"The section where these leases were located was entirely undeveloped at that time, except for farming, and was discredited as coal or mineral territory by the state geological survey. There was no railroad into it, and in view of this it was provided, in somewhat varying terms, in all but four of the leases here in controversy, that unless one was built within five years they should be null and void. As to those where no such provision appears it is charged in the bill that there was a verbal undertaking to the same effect by the defendant's agent at the time of securing them. But this is denied in the answer, and the evidence to sustain it is unsatisfactory, and they must therefore be taken as they stand. A railroad being a recognized necessity, however, the defendant Brown, in addition to his leases, busied himself with getting rights of way, some 64 of which he secured, 7 of these being from parties whose leases are involved in this suit. The railroad which he had in contemplation was to start at Johnstown, Pa., on the main line of the Pennsylvania Railroad, and run up Stony creek, and Paint or Shade creek, to the old Rockingham furnace at the head of the latter, and thence southeasterly, by other waters, in the direction of Hagerstown, Md.; and it was in general conformity with this that the rights of way were taken. No such railroad, however, was ever built. But in 1880 the Baltimore & Ohio Railroad constructed a branch from their line at Rockwood, Pa., northerly about 40 miles, through the center of Somerset county, to Johnstown, which followed down Stony creek

[1] See note at end of case.

Digitized by Google

a part of the way, by the mouth of Shade and Paint; and when it was being laid out the defendant Brown put his rights of way at the service of the Baltimore & Ohio engineers, although none of them were made use of. The building of this road, however, did not lead to the mineral development of that section, which came about a number of years later in quite another way. In 1892 to 1894 Robert H. Sayre and others began taking up coal lands in this territory, getting together about 18,000 acres, including much of that which is now in controversy, which they subsequently conveyed to the Wilmore Coal Company, which they had organized; and a year or two afterwards they sold out their interests in the company to Mr. Edward J. Berwind, president of the Berwind-White Coal Mining Company, who thereby secured their holdings, which he increased later to some 35,000 or 40,000 acres. Both Mr. Sayre and his associates, and Mr. Berwind after him, bought outright, at so much an acre, the coal which they purchased; that already leased to the defendant Brown being conveyed to them in fee by the original lessors or those who had succeeded to the title, in most instances without regard to the leases, but in some cases subject to them, the rights of the lessors being assigned, and in all with actual knowledge of them. Having got together this extended acreage, Mr. Berwind, endeavored to induce the Pennsylvania Railroad to run in a branch, but they declined to do so; and he was compelled to undertake it individually, which he did at an expense of about $500,000. This and the development of the different properties for mining, which followed, involving about $1,000,000 more, extended over two or three years, and not until some time in 1897, therefore, was any mining done; but since that time it has been actively pursued, and an extensive business built up, the operations being conducted by the Berwind-White Coal Mining Company, under the Wilmore Coal Company, to whom a royalty of 10 cents a ton is paid.

"In securing the lease in suit and others in that region, Mr. Brown did not expect to do any mining personally, and he has not, either by himself or others, nor has he paid royalties at any time on any of them; his purpose being to sell the leases to others or to transfer them to some company in which he had an interest, which would operate them. He sold some of his holdings in the southern part of the county in this way, and he made several attempts to interest parties in the others, including the New York Central Railroad people, and the Baltimore & Ohio. Learning of Mr. Berwind's purchases, he finally offered them to him, but without success; these negotiations ending in the spring of 1895, after which no others were undertaken. In 1892 certain of the leases were assessed and sold for taxes, but were redeemed by Mr. Brown, who paid some $1,500 to do so. They were sold again in 1896, but this he resisted, and succeeded in having the sale set aside by the court. Learning in 1902 that the Berwind-White Company were mining on certain of the lands which he had leased, he sent an engineer to investigate the matter, receiving from him a detailed and extended report, which confirmed the information, upon which he took counsel, with the idea of legal action. Some delay was experienced, however, with regard to this, the one-quarter interest, which he had assigned to the agent who secured the leases, being outstanding in the hands of various parties. But these having been got into line, a corporation was organized—the New Amsterdam Coal Company, defendant—to which all interests were transferred in exchange for stock; and in 1904 actions were brought by that company against the Berwind-White Coal Mining Company in the United States Circuit Court for the Southern District of New York for damages for taking the coal from six of the different tracts in controversy, following which, in May, 1904, the present bill was filed."

The conclusion reached by the learned judge was that the leases held by the defendants were invalid, and that, as they constituted a serious cloud upon the title of the plaintiff company, it was entitled to a decree requiring that they "be delivered up and canceled, and a minute of it made in the office where they are on record, limited always, however, to the coal, and not the other minerals, as to which

Digitized by Google

alone an issue has been made." Omitting details, and eliminating the declaratory portions of the decree, it appears that its remedial part conforms precisely to the conclusion above referred to. That part may be restated thus:

"* * * Each and all of the said 18 leases or agreements hereinbefore described be, and the same hereby are, canceled, so far as the same purport in any way to affect the coal upon the said premises, or the right to enter the said premises and mine the coal upon the said premises, or in any other way affect the title to the coal upon the said premises; and * * * that upon delivery of a copy of this decree, duly certified by the Clerk of the United States Circuit Court, Western District of Pennsylvania, to the recorder of deeds of said county of Somerset, he, upon payment of the proper fees, enter the same or a minute thereof upon the margin of the record of each of said agreements or leases, and that thereafter it be filed among the records of his office."

Of the existence of the jurisdiction which was invoked, and of the propriety of its exercise under the circumstances stated by the court, there can be no doubt; and therefore the correctness of the decree must depend solely upon the answer which should be made to the question: Did the instruments of writing held by the defendants below vest in them a valid and paramount title to the coal in question, as against the plaintiff in possession under title through later conveyances? In deciding this question we need not discuss all of the many points and authorities to which counsel have invited our attention, for, as we view it, it may be briefly determined by simply applying the plain terms of the instruments themselves to the conclusively established facts.

Let it be conceded, as the court below held, that "the so-called leases to the defendant Brown constituted a sale and conveyance of the coal * * * in place." Yet it does not follow that he was entitled to have it remain in place indefinitely, notwithstanding his undertaking to pay for it from time to time, "as mined * * * or otherwise reduced to possession." The fact is that he never mined at all, nor made any payment whatever under his agreement to pay "for every ton of coal" "removed and taken from the premises." He could not abandon the possession, for he never had it, and his grantors could not have re-entered without first withdrawing, and this it was not incumbent upon them to do under any possible view of the provisions respecting mining and railroad construction. "* * * The party would not be required to turn out and re-enter. The law does not require the performance of vain things." Clark v. Trindle et al., 52 Pa. 492–496; Hamilton v. Elliott, 5 Serg. & R. 375; Innis v. Templeton, 95 Pa. 262, 40 Am. Rep. 643.

This case differs materially from that of Plummer v. Hillside Co., 160 Pa. 483–494, 28 Atl. 853, where "the consideration of the grant was not the development of the mineral value of the land, but the price fixed by the agreement and actually paid to the lessor in money." Brown, by the very nature of his contract, was bound by obligations to be fulfilled, as well as clothed with rights to be exercised; and "while the question [of abandonment] is one of intention mainly, its decision does not depend upon an intention to abandon or retain the

Digitized by Google

mineral right alone, divorced from the obligations which adhere to it under the contract, but the intention to abandon the contemplated enterprise." Paine v. Griffiths, 86 Fed. 455, 30 C. C. A. 182; Elk Fork Co. v. Jennings (C. C.) 84 Fed. 839. That the parties to these instruments contemplated the prosecution of an enterprise, and not an absolute sale of coal in place, their whole tenor makes perfectly plain; and that the lessee did not really intend to carry on that enterprise the proofs abundantly show.

The decree of the Circuit Court is affirmed.

NOTE.

"This indenture, made this 3d day of January, one thousand eight hundred and seventy-nine, by and between Abraham Weaver, of the county of Somerset and state of Pennsylvania, of the first part, and J. Willcox Brown, of the city of Baltimore and state of Maryland, of the second and other part, witnesseth: That the said party of the first part, in consideration of the sum of five dollars, to them in hand paid by the said party of the second part (the receipt whereof is hereby acknowledged), have granted, bargained, sold, aliened, enfeoffed, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, and confirm, unto the said party of the second part, his heirs, executors, administrators, and assigns, all the iron ore, coal, cement, and fire clay and all other minerals of every kind, including stone or earth as may be required for mining operations in, upon, and under all that certain tract of land situated in Paint township, county of Somerset, and state aforesaid, and containing one hundred and seventeen acres, more or less, and described as follows: Adjoining land with T. Hays, D. Shaffer, J. Nerenberger, and others—(all minerals are to be drifted) with the appurtenances thereto appertaining, together with the full and exclusive right, liberty, and privilege of mining, taking, and carrying away said iron ore and other materials, as heretofore more fully recited, with such control of, rights in, and privilege of using said land and water as may be necessary in conducting mining operations in a full and convenient manner. To have and to hold all the said iron ore and other materials, as is more fully recited heretofore, and all the rights and easements aforesaid in, upon, through, and under the said tract of land, and the hereditaments and premises hereby granted or mentioned, and intended so to be, unto the said party of the second part, his heirs, executors, administrators, and assigns, to and for his and their only proper use and behoof, for the period of ninety-nine years from the date hereof. The said party of the first part further covenants, for his heirs, executors, administrators, and assigns, that he will, upon the proper demand of the party of the second part, his heirs, executors, administrators, and assigns, and at the expiration of the term herein provided for, and upon tender by the said party of the second part, his heirs, executors, administrators, and assigns, of ——— dollars, execute another lease. If the railroad be not commenced within five years from this date, then this contract to be null and void.

"In further consideration whereof, the said party of the second part, his heirs, executors, administrators, and assigns, promises and agrees with the said party of the first part, his executors, administrators, and assigns, that he will, at the expiration of every three months, whenever any ore or other materials, as hereinbefore more particularly recited, is mined, quarried, or otherwise reduced to possession by the said party of the second part, his heirs, executors, administrators, and assigns, and removed from the premises, render to the said party of the first part, his heirs, executors, administrators, and assigns, a true and correct account of the materials removed and taken from the premises during the said preceding three months, and pay it to the said party of the first part, his heirs, executors, administrators, and assigns, as follows, that is to say: For every ton of iron ore of 2,240 pounds, ten cents. For every ton of coal of 2,240 pounds, five cents. For every ton of cement or fire clay of 2,240 pounds, five cents. For every ton of mineral ores, other than the above, of 2,240 pounds, five cents.

Digitized by Google

"In witness whereof, the parties hereto have set their hands and seals this 3d day of January, in the year one thousand eight hundred and seventy-nine.

Abraham Weaver. [Seal.]
"J. Wilcox Brown. [Seal.]

"State of Pennsylvania, Somerset County—ss.:

"Before me, a justice of the peace in and for the said county and state, personally came Abraham Weaver, the grantor, and acknowledged the foregoing instrument of writing to be his act and deed, and desired the same to be recorded as such, according to law.

"Witness my hand and seal, the 3d day of January, A. D. 1879.

"Stephen H. Griffith, Justice of the Peace. [Seal.]"

(153 Fed. 148.)

BURNS v. COOPER.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1907.)

No. 2,430.

APPEAL—REVERSAL—FURTHER PROCEEDINGS—MANDATE.

A mortgage having been executed by a husband and wife, suit was brought to foreclose the same, and a decree rendered charging the life estate of the wife, as widow of a former husband, as well as her after-acquired title to the remainder. This decree was reversed, in so far as it affected such after-acquired title, and the cause was remanded, with directions to render a decree charging the wife's life estate. *Held*, that such judgment constituted the law of the case so far as the wife's life estate was concerned, and that a decree following such mandate was not objectionable for failure of the Circuit Court to declare the decree without prejudice to the future determination of the nature and extent of the wife's interest in the premises at the date of the mortgage.

Appeal from the Circuit Court of the United States for the District of Nebraska.

A. M. Post (John J. Sullivan, on the brief), for appellant.

C. C. Flansburg (R. O. Williams, on the brief), for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. The single question presented by this appeal is: Does the decree which it challenges conform to the mandate of this court issued when the case was here before? A full statement of the case is made in the opinion then rendered (Burns v. Cooper, 72 C. C. A. 25, 140 Fed. 273), and it will suffice to now briefly mention such matters as are relevant to the question just stated. The suit was one to foreclose a mortgage containing full covenants for title given by Martin Burns and Mary Burns, his wife, upon land in Nebraska to secure the payment of their joint promissory note. One of the defenses interposed by the wife was that she executed the note and mortgage solely for the benefit of her husband, and that, although she had a right or estate in the land at the date of the mortgage, she did not then have the full title, and, although she had subsequently acquired the full title, the mortgage did not affect the after-acquired title, by estoppel or otherwise, because under the laws of the state in force at the date of the mortgage a married woman could not bind her after-acquired property for the benefit of her husband. In the

Digitized by Google

bill it was alleged that her right or estate in the land at the date of the mortgage was "a life estate" of which she had become seised upon the death of her former husband, Daniel Foley, then the owner of the land; "said life estate being the right of homestead of the said Mary Foley (now Mary Burns) and her vested right of dower in and to said premises." In her separate answer it was alleged that, upon the death of Daniel Foley, "said property descended to his said children subject to the estate for life therein with which this respondent was seised as such widow, and said children were thereupon seised of said property by title in fee simple subject to the exception above stated," and, as further illustrating her attitude in respect of the nature and extent of her right or estate in the premises at the date of the mortgage, she sought in her answer, as also at the final hearing, to obtain some advantage from prior litigation to which she was a party and in which it was found and adjudged "that the said Mary Burns, then Mary Foley, has a life estate in said land as the survivor of her said husband, Daniel Foley." In the opinion rendered by the Circuit Court at the final hearing (Cooper v. Burns, 133 Fed. [C. C.] 398), it was stated that among the questions presented for determination were these:

"Fourth. Did the fact that Mary Burns had a present vested life estate in said lands at the time she executed complainant's mortgage, and that said mortgage contained the before mentioned covenants as to title, extend the lien of complainant's mortgage to her after-acquired title to the remainder? Fifth. Mary Burns, at the time of the execution of complainant's mortgage, having an existing vested life estate in the mortgaged premises, is she now estopped by virtue of the covenants in the mortgage from asserting that such mortgage is not a lien upon the entire fee estate?"

These questions were answered in the affirmative, and, it appearing that an undivided one-half of the estate in remainder was acquired by her subject to an intervening mortgage, a decree was passed declaring the complainant's mortgage a first lien "on the life estate of respondent, Mary Burns, in said premises," and also a first lien on one undivided one-half, and a second lien on the other undivided one-half, of the estate in remainder. From that decree she appealed to this court, the gravamen of her complaint, as stated in her assignments of error, being that:

"The Circuit Court erred in finding and determining that the mortgage described in the bill of complaint is a lien upon the entire present estate of the respondent, Mary Burns, in the mortgaged property, and in failing to limit and restrict such lien to the interest and estate of said respondent in said property at the date of the execution of such mortgage."

There was no assignment that the Circuit Court erred in finding and determining that at the time of executing the mortgage she had a present vested life estate in the land, or that it erred in declaring the mortgage a lien upon such life estate.

This court, in the opinion rendered upon that appeal, stated at the outset that:

"Prior to the 5th day of July, 1877, one Daniel Foley was the owner of 150 acres of land in Platte county, Neb., occupied by himself, his wife, Mary Foley, and their minor children, Jeremiah and Mary E. Foley, as a homestead. On that day Daniel Foley died intestate, the property descending

Digitized by Google

under the laws of the state of Nebraska to the children, share and share alike, subject, however, to the right of homestead and the vested right of dower in the widow; these rights of homestead and dower, in practical effect, amounting to a life estate in Mary Foley."

Then after it was also stated that all had conceded that "the mortgage binds the life estate of Mary Burns," and after the questions presented by the appeal in respect of the effect of the mortgage upon after-acquired title were considered the decree of the Circuit Court was, for reasons there given, held erroneous and reversed, in so far as it fixed the lien of the mortgage upon a greater interest in the lands than "the life estate of appellant, Mary Burns, as held by her at the date of the mortgage," and it was directed that a decree be entered in conformity with the opinion. The mandate subsequently issued precisely followed this ruling and direction.

Upon receiving the mandate the circuit court entered another decree declaring, as did the prior one, the complainant's mortgage a first lien "upon the life estate of Mary Burns in the premises," and directing a sale of such life estate to satisfy the mortgage debt, with costs, if not paid within 20 days, but this decree, differing from the prior one, gave the mortgage no effect beyond this. Mrs. Burns at that time proposed, and the court declined to adopt, the following limitation upon the decree:

"Provided, however, that the decree is without prejudice to the rights of her, the said Mary Burns, and of her successors in interest in respect to the nature and extent of the life interest or estate possessed by her, the said Mary Burns, in the aforesaid real property at the date of the execution of the above-described mortgage and without prejudice to the rights of either or any party in respect to the nature or extent of the interest or estate in said real property which will vest in a purchaser under this decree, such questions and each thereof being hereby expressly reserved by the court."

She then appealed from this decree, and now takes the position that we did not upon the first appeal determine the nature or extent of the right or estate held by her in the premises at the date of the mortgage, that the Circuit Court should have proceeded to determine that matter or should have expressly reserved it, and that, in disregard of the terms of the mandate, the Circuit Court fixed the lien of the mortgage upon an estate for her life in the premises, when, in fact, she did not have such an estate at the date of the mortgage, but was only entitled, at her election, to possess and occupy the premises as a homestead for her life, which was a mere personal right and not vendible, or to take, as dower, a life estate in one third thereof.

What has been said indicates quite strongly that, prior to the original decree, the appellant did not make any such claim as is now put forth, and that she did not upon her first appeal question the Circuit Court's decision that she had a present vested life estate in the premises at the date of the mortgage; but we pass to the question first above stated: Does the second decree conform to the mandate of this court issued when the case was here before? We think it does. As has been shown, the appellant was treated in our former opinion as having at the date of the mortgage a right of homestead and a vested right of dower in the land, the two, in practical effect, amounting to a life estate, and it was distinctly stated that it was conceded by all

Digitized by Google

that the mortgage was a lien upon this estate. It is not possible to read the opinion without understanding that the life estate so frequently spoken of therein was one in the entire mortgaged premises, and not in some undivided part of them; and, when the concluding paragraph declared that the decree was erroneous and must be reversed, in so far as it fixed the lien of the mortgage upon a greater interest in the land than the life estate of the appellant, "as held by her at the date of the mortgage," these last words were employed as indicating that such was the nature and extent of the estate held by her at that time, as had been before stated, and not as qualifying the ordinary acceptation and meaning of what immediately preceded them. By the plainest implication the opinion held that, when the mortgage was given, the appellant was possessed of homestead and dower rights in the land, amounting to a life estate, and that this was all that was bound by the mortgage; and the decree was reversed because it also declared the mortgage a lien upon the after-acquired estate in remainder. The case is thus fully within the ruling in United States v. California, etc., Co., 148 U. S. 31, 38, 13 Sup. Ct. 458, 37 L. Ed. 354. There the Supreme Court upon a former appeal had reversed a decree dismissing the bill of the United States; the reason for the reversal being that the Circuit Court, upon sustaining pleas interposed by the defendants, erred in dismissing the bill without permitting the United States to reply to them, and the reversal was accompanied by a direction that the United States be permitted to join issue on the pleas. The Circuit Court thereafter restricted the scope of the inquiry to the truthfulness of the matters set forth in the pleas, and upon a second appeal the United States assigned error upon this ruling. Mr. Justice Brewer, after referring to the opinion rendered upon the first appeal and stating that the mandate sent to the Circuit Court conformed to the opinion, said:

"That decision was the law of this case for the subsequent proceedings in that court. There was no adjudication that the pleas were insufficient in law. On the contrary, the plain implication of the opinion was that they were sufficient, and the question which was remanded to that court for inquiry was as to their truthfulness. There was no adjudication of insufficiency and no rehearing ordered on that question. If the government was not satisfied with the decision, it should have called our attention to it, and have sought a modification or enlargement of the decree. The Circuit Court properly construed it, and proceeded in obedience thereto to permit the government to join issue on the pleas, and to entertain an inquiry as to their truthfulness, and that was the only matter open for inquiry."

As the Circuit Court properly interpreted and followed our former opinion and mandate, that must end the controversy; for our former decision, like the final decision of every court which has jurisdiction of the matters and parties it judges, rendered every question which was actually determined upon that appeal, and every question which might have been then raised in opposition to the decision, res judicata between the parties to it as respects the claim or cause of action there litigated. Guarantee Co. of North America v. Phœnix Ins. Co., 59 C. C. A. 376, 124 Fed. 170; United States Mining Co. v. Lawson, 67 C. C. A. 587, 594, 134 Fed. 769, 776; Haley v. Kilpatrick, 44 C. C. A. 102, 104 Fed. 647; Board of Com'rs v. Geer, 47 C. C. A. 450, 108 Fed. 478; In re

Digitized by Google

Sanford Fork & Tool Co., 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; Illinois v. Illinois Central R. R. Co., 184 U. S. 77, 91, 22 Sup. Ct. 300, 46 L. Ed. 440.

The decree is accordingly affirmed.

(153 Fed. 152.)

STANLEY v. BECKHAM.

(Circuit Court of Appeals, Eighth Circuit. April 23, 1907.)

No. 2,397.

1. EVIDENCE—CONVERSATION—RIGHT TO EXPLAIN, VARY, OR CONTRADICT.

Where the whole or part of a conversation is put in evidence by one party, the other is entitled to explain, vary, or contradict it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 455.]

2. TRIAL—RECEPTION OF EVIDENCE—SCOPE OF REBUTTAL.

In an action for broker's services, defendant sought, on cross-examination of plaintiff, to prove an agreement to accept an employment and certain stock, in full for his services; but this, on objection, was excluded as not proper cross-examination, as being matter of defense. As a part of the defense, one of defendant's witnesses testified that, after the services had been rendered, plaintiff in a stated conversation, accepted as full compensation a position as salesman and defendant's agreement to carry for him, on certain terms, certain capital stock of a corporation. *Held*, that it was error, after the admission of such evidence, to refuse to permit plaintiff in rebuttal to give his version of such conversation, though plaintiff had previously in such cross-examination, testified to certain phases thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 146–155.]

3. SAME—EXCLUSION OF EVIDENCE—OFFER OF PROOF—NECESSITY.

Where, when a witness testifies in person at the trial, and not by deposition, certain questions asked of him are in proper form, relevant, and admit of favorable answers on behalf of the party propounding them, the sustaining of an objection thereto constitutes error, though there is no offer to show the substance of the proposed testimony; no offer being required by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 115–118.]

4. SAME—MISLEADING INSTRUCTIONS—BROKERS—ACTION FOR SERVICES.

Plaintiff was employed to get information with reference to the contemplated purchase of a grocery business for defendant, and to obtain a statement from the prospective sellers showing the volume of their business, amount of capital used, merchandise usually carried, salaries paid, profits realized, etc., but was expressly charged not to disclose his principal's name. On beginning negotiations, the sellers declined to make any statement, unless informed concerning plaintiff's principal, whereupon he disclosed defendant's name and obtained the required information, shortly after which defendant authorized the disclosure of his name, and then completed the negotiations himself, expressing satisfaction with plaintiff's efforts. *Held*, that, as applied to this evidence, in an action for plaintiff's commissions, it was error to charge that a broker, in order to show himself entitled to commissions, must faithfully carry out the instructions given by the principal, and has no right to depart substantially therefrom.

In Error to the Circuit Court of the United States for the District of Colorado.

Digitized by Google

Thomas M. Morrow (William T. Skelton, on the brief), for plaintiff in error.

Edmund F. Richardson and Horace N. Hawkins, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This was an action by John T. Stanley to recover from James H. Beckham the reasonable value of services alleged to have been rendered by the former at the latter's request in certain preliminary negotiations resulting in his purchase of the wholesale grocery business of N. B. McCreary & Co., of Denver, Colo. The verdict and judgment were for the defendant, and the plaintiff prosecutes this writ of error.

One of the issues presented by the pleadings was whether, after the rendition of the services in question, the plaintiff had accepted, as full compensation therefor, the defendant's engagement to employ him as a salesman in the business and to carry for him $5,000 of the capital stock of a corporation to which the business was transferred. As part of his case in chief, the plaintiff, testifying in his own behalf, explained the circumstances of his alleged employment and the services rendered, and upon his cross-examination the following occurred:

"Q. Do you remember having had a conversation with him [Mr. Beckham] one night shortly after January 1st [when the purchase was consummated], or about that period, in the Albany Hotel? A. Yes, sir. Q. Did you not in that conversation ask Mr. Beckham, say to Mr. Beckham, that you had come to see him about the position which he had promised you, and that you wanted to know what he was going to do in the way of a position for you? A. No, sir. Q. Did he not in that same conversation say to you that he would give you a position? A. He sent for me to come to the hotel to see him that night. Q. And did he not on that visit state to you that he was going to give you a position in his business house? A. He told me if I wanted it, yes. Q. And you and he agreed on what you were to charge, what you were to receive for holding that position, did you not? A. Yes, sir. Q. You were to receive a commission which he guarantied to be not less than $100 a month, did you not? A. He never made any guaranty to me at all. Q. Never? A. Never, none; no, sir. Q. Who was present when this conversation occurred? A. Mr. McKnight. Q. Mr. McKnight was a gentleman who had been in business for many years with Mr. Beckham in Kansas City, had he not? A. Yes, sir. Q. You knew Mr. McKnight very well?

"Mr. Morrow (for plaintiff): We object to this as improper cross-examination. We did not go into it in any way, shape or form. It is a matter of defense.

"The Court: If it is in the case at all, I think it is a matter of defense.

"Q. I wish you to state what that conversation was that night at the Albany Hotel. (Objected to by counsel for plaintiff.)

"The Court: He may answer the question. (To which ruling of the court counsel for plaintiff then and there duly excepted.)

"Q. Didn't you say to Mr. Beckham at the time, in the presence of Mr. McKnight, that you felt amply repaid in the position which he gave you then, for everything you had done in interesting him in business in Denver? A. No, sir; I never made such a statement. Q. No such conversation as that occurred at all? A. No, sir. Q. In that conversation did not Mr. Beckham also say to you that he was going to carry $5,000 of stock for you, and that you should have that $5,000 of stock when it was paid for, and that you wouldn't have to pay for it yourself, but that it should be paid for out of the profits of the business, and that all dividends over and in excess of 6 per cent. should

Digitized by Google

be credited on the purchase price, and when it was paid for he would turn it over to you; and then did you not say that, in exchange for the position which he had given you and the opportunity to become a stockholder, you felt amply repaid, and were repaid, for everything that he had done, and that you felt extremely grateful to him for what he was doing for you? (Objected to by counsel for plaintiff, as improper cross-examination. Which objection was by the court sustained. To which ruling of the court counsel for defendant then and there duly excepted.)

"Mr. Hawkins (for defendant): So that I may not pursue that any further. I understand your honor's ruling to be that it is a part of the defense?

"The Court: Yes, sir."

As part of the defense, the defendant and Mr. McKnight testified at length respecting the conversation at the Albany Hotel; their version thereof being that the defendant then proposed, and the plaintiff accepted, as full compensation for his services, an arrangement by which he was to be made a salesman in the business and the defendant was to carry for him upon the terms indicated $5,000 of the capital stock of the corporation. Then in rebuttal the plaintiff again became a witness, and the following occurred:

"Q. Now, you heard the version of the conversation in the Albany Hotel? A. Yes, sir. Q. You can give your recollection of it.

"Mr. Hawkins: That is objected to. I asked Mr. Stanley about that.

"The Court: Omit that; he went over that yesterday fully. If there is any specific matter he failed to speak of yesterday, or any part of the conversation overlooked, you may ask him in regard to that. (To which the plaintiff excepted.)

"Q. You may state whether or not you stated to Mr. Beckham at that time that what he had done for you in giving you a position and in holding stock for you amply repaid you for any services that you had rendered? (Objected to by counsel for plaintiff, because that was gone over.) "The Court: I think that was in his statement, but he may answer this.

"A. Mr. Beckham asked me to come to the office—Q. That is not the question, did you ever make that statement to him? A. No, sir. Q. And did he state to you that he would give you this position, and that he would hold this stock for you to compensate you for your services performed for him? (Objected to for the reasons last above stated. Objection sustained. Exception allowed.)"

Error is assigned upon the rulings preventing the plaintiff from giving in rebuttal his version of the conversation mentioned, and we entertain no doubt that in this there was error, for, where the whole or part of a conversation is put in evidence by one party, the other party is entitled to explain, vary, or contradict it. Carver v. United States, 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602; Home Benefit Association v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; Chicago City Railway Co. v. Bundy, 210 Ill. 39, 44, 71 N. E. 28; Hoggson, etc., Co. v. Sears, 60 Atl. 133, 136, 77 Conn. 587. And it is immaterial that upon the prior cross-examination the plaintiff had been interrogated respecting some particular phases of the conversation, for, as it had not been made, and was not necessarily, part of his case in chief, he was entitled in rebuttal to give his version of it and to go into every phase of it having any tendency to show that the defendant's version was not the correct one. The rulings seem to have been made in the belief that the subject had been fully covered by the prior cross-examination, but the belief was a mistaken one according to the record, for it shows that the cross-interrogatory, "I wish you to state what that

Digitized by Google

conversation was that night at the Albany Hotel," the only one calling for the plaintiff's full version, was not answered, and also that the cross-examination was stopped by the court's ruling that it related to what, if admissible, was part of the defense. But it is said there was no offer to show the substance of the testimony proposed to be elicited by the questions propounded and excluded in rebuttal, and therefore it does not appear that their exclusion was reversible error. The premise is correct, but not the conclusion. The controlling rule, applicable where the witness testifies in person at the trial, and not by deposition, as stated by Mr. Justice Harlan, in Buckstaff v. Russell, 151 U. S. 626, 637, 14 Sup. Ct. 448, 452, 38 L. Ed. 292, is this:

"If the question is in proper form, and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer; but, if that be not done, the rejection of the answer will be deemed error or not, according as the question upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded."

And this rule is recognized in other cases. Origet v. Hedden, 155 U. S. 228, 235, 15 Sup. Ct. 92, 39 L. Ed. 130; Atchison, Topeka & Santa Fé Ry. Co. v. Phipps, 60 C. C. A. 314, 316, 125 Fed. 478, 480.

As it is plain that here the questions were in proper form, were relevant to the issues, and admitted of answers favorable to the party in whose behalf they were propounded, and as a statement of what was proposed to be proved was not required by the court, there was prejudicial error in not permitting the questions to be answered.

Error is also assigned upon the giving of the following instruction to the jury:

"You are instructed that an agent or broker must, in order to show that he is entitled to commissions from his principal, faithfully carry out the instructions given by the principal. He has no right to depart substantially from such instructions."

That in the abstract the instruction was correct must be conceded; but we think it was so plainly calculated to mislead the jury when they came to apply it to the case committed to their consideration that there was error in giving it. The only respect in which it could be said from the evidence that the instructions of the defendant had been departed from by the plaintiff was that, although instructed not to do so, he had disclosed to N. B. McCreary & Co. the name of his principal in the early part of his negotiations with them. The facts in that connection were these: The defendant, who resided in Kansas City, Mo., was desirous of purchasing a wholesale grocery business in Denver, Colo., and the plaintiff, who resided at the latter place, was conducting preliminary negotiations, under the defendant's instructions, to the end that his desire might be realized. One of these instructions, repeated in several of the defendant's letters, was, "My name must not be used," and another was to obtain for him a statement from the prospective sellers giving in detail the volume of their business, amount of capital used, amount of merchandise usually carried, salaries paid, profits realized, etc. When the negotiations with McCreary & Co. began, they

Digitized by Google

declined to make such a statement, unless informed for whom it was intended, so they might determine whether he was a responsible party. The plaintiff then, without obtaining the defendant's consent, disclosed his name, and was thus enabled to obtain and transmit to him the statement requested. About a month later, while the negotiations were still in progress, the defendant authorized the disclosure of his name, and still later went to Denver, and, as it was previously understood he would do, took up the negotiations himself and carried them to completion, availing himself of the results obtained by the plaintiff, and expressing satisfaction therewith. There was no evidence that in prematurely disclosing the identity of his principal the plaintiff was actuated by any purpose other than that of obtaining the statement covered by his instructions, or that the disclosure operated prejudicially to the defendant or advantageously to McCreary & Co. In these circumstances, we think the plaintiff's departure from the instructions of his principal was so unsubstantial, so devoid of any imputation of bad faith, and so plainly free from resulting injury to his principal, that it did not affect his right to recover for his services, if he was otherwise entitled to recover. Story on Agency, § 331; Hinton v. Coleman, 76 Wis. 221, 45 N. W. 26; Veasey v. Carson, 177 Mass. 117, 58 N. E. 177, 53 L. R. A. 241. The jury, however, could not well have regarded the court's instruction otherwise than as committing to their judgment the question of whether there was such a departure from the instructions of the principal as to disentitle the agent to compensation for his services.

It is said that the evidence was so overwhelmingly in favor of the defendant that, notwithstanding the matters here considered, no jury would have found for the plaintiff; but of this it is enough to observe that, while the evidence for defendant was strong and persuasive, there was yet such a conflict between it and the evidence for the plaintiff as to entitle the latter to a submission of the issues to the jury.

The judgment is reversed, with a direction to grant a new trial.

Digitized by Google

(153 Fed. 157.)

AUGUSTA TRUST CO. v. FEDERAL TRUST CO. et al.

(Circuit Court of Appeals, First Circuit. February 1, 1907. On Appeal from Taxation of Costs, March 27, 1907.)

No. 667.

1. STREET RAILROADS—LIEN UNDER MASSACHUSETTS LAW.

Rev. Laws Mass. 1902, c. 112, § 23, requiring a street railroad company before issuing mortgage bonds to obtain authority therefor from the state board of railroad commissioners, which may be granted only after a hearing and examination into the assets and liabilities of the company, and upon being satisfied that its property exclusive of its franchise equals or exceeds its indebtedness, embodies a rule of public policy which cannot be ignored nor overridden by the courts.

2. SAME—AGREEMENT TO ISSUE BONDS.

A provision in notes, given by a Massachusetts street railroad company, by which it agreed to issue to the holder as security certain of its bonds secured by a mortgage previously executed, as soon as a further issue of bonds thereunder should be authorized by the state railroad commissioners, whose authority was necessary before they could be legally issued under Rev. Laws Mass. 1902, c. 112, § 23, does not place the notes on an equality with bonds previously issued, nor entitle the holders to any preference over general creditors where no further issue of bonds was authorized, and the company has become insolvent and is in the course of administration, although the circumstances were such as to create an equitable lien as between the parties which the courts would enforce in the absence of the statute.

3. COSTS—SEPARATE COSTS.

Where appellees recover costs in the Circuit Court of Appeals, separate costs are taxed for the several appellees who appear separately and file separate briefs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 921.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Orville D. Baker (Daniel C. Stanwood, on the brief), for appellant.

Joseph P. Fagan (James C. Cotter on the brief), for appellee Federal Trust Company.

Joshua M. Sears, for appellees John T. Burnett and John L. Hall.

William M. Richardson, for appellee Massachusetts Securities Company.

Before PUTNAM and LOWELL, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. The facts are sufficiently stated in the opinion of the learned judge of the Circuit Court reported as Augusta Trust Co. v. Federal Trust Co. (C. C.) 140 Fed. 930, except that we deem it advisable for convenience to repeat here in full one of the notes.

No. 75.

$5,000. Boston, Mass., February 5, 1903.

For value received the Middleboro, Wareham and Buzzards Bay Street Railway Company, incorporated under the laws of Massachusetts, promises to pay to ourselves or order the sum of five thousand dollars on the fifth day of August, 1903, at the office of Federal Trust Company, in the city of Boston, Mass., with interest at the rate of 6 per centum per annum.

It is hereby certified that the issue hereof has been duly authorized by law and by the proceedings of the said company and does not exceed any limit prescribed by law.

Digitized by Google

The Middleboro, Wareham & Buzzards Bay Street Railway Company hereby agrees to use the proceeds of $6,000 of its first mortgage bonds Nos. 205 to 210 in payment of its note dated February 5th, 1903, payable August 5th, 1903, and in case the said note shall not be paid at maturity the said company agrees to deliver $6,000 of its said first mortgage bonds to the owner of the said note as security therefor within a reasonable time after the same shall have been authorized by the board of railroad commissioners. The said company agrees not to agree to deliver first mortgage bonds to any person or corporation in excess of $500,000 for an extension of its tracks from Buzzards Bay into the town of Falmouth, and equipment for the same.

In witness whereof the said Middleboro, Wareham & Buzzards Bay Street Railway Company has caused this common seal to be hereto affixed and these presents to be signed in its behalf by its treasurer thereto duly authorized.

Middleboro, Wareham & Buzzards Bay Street Railway Company,
Thomas F. Carey, Treasurer.

Approved by
Edward A. Mead,
Chas. S. Cummings, 2d,
Executive Committee.

Indorsements.

Oct. 3, 1903. Received five hundred dollars.
Oct. 30, 1903. Received five hundred dollars.
Nov. 6, 1903. Received five hundred dollars.
Dec. 26, 1903. Received five hundred dollars.
Jan. 4, 1904. Received five hundred dollars.
1904, Jan. 15. Received five hundred dollars.

Middleboro, Wareham & Buzzards Bay Street Railway Company,
Thomas F. Carey, Treasurer.

Horace B. Parker.
Thomas F. Carey.

Article X.

The directors may appoint an executive committee of not more than three. The duty of the committee shall be to have full charge and control of the making and executing of all contracts for the financing and constructing and furnishing equipment for the road, and all notes or bills payable, not including bonds secured by mortgage, to be legal and binding upon the company shall be signed by the treasurer and approved on their face by the signature of at least two of the executive committee.

Middleboro, Wareham & Buzzards Bay Street Railway Company First Mortgage 5% Bonds.

This is to certify that Note No. 75 is entitled to six (6,000) thousand dollars in first mortgage 5% bonds of the Middleboro, Wareham & Buzzards Bay Street Railway Company Bonds Nos. 205 to 210 secured by a mortgage or deed of trust to the Federal Trust Company as trustee, which bonds, or the sum payable by the underwriter of same, is to be delivered to said holder of Note No. 75 as soon as said bonds are engraved and certified by said trust company and authorized by the railroad commissioners of Massachusetts and upon return of this certificate properly indorsed. Said bonds are to be subject to order of the company upon fulfillment of the attached note.

Middleboro, Wareham & Buzzards Bay Street Railway Company,
By Thomas F. Carey, Treasurer.

Recorded, Boston, Feb. 5, 1903.
Federal Trust Co., by David Bates, Treasurer.

We also reiterate the fact that the moneys advanced upon the notes in question were bona fide used in the construction of the railway of the corporation whose obligations are involved here. We also desire to call attention to the fact that the mortgage under which the complainant claims rights in this proceeding expressly provided that the bonds secured thereby might be used, not only for furnishing means of construction and equipment, but "for funding the floating debt"

Digitized by Google

"that has been incurred for construction," etc. Therefore, by the very terms of the mortgage, it was lawful, so far as the corporation itself and the mortgage were concerned, to issue bonds as stipulated in the notes given the complainant, and the holders of the bonds which have in fact been issued according to the terms of the mortgage had lawful notice thereof; so that, so far as they are concerned, and the corporation also, there is, aside from the statutes hereinafter referred to, no equity prohibiting the relief which the complainant seeks.

We also desire to call attention to the fact that, although bonds to the amount of only $150,000 had been issued under the mortgage, the mortgage provided for additional bonds, completing the entire sum of $500,000, and those additional bonds were identified in advance by serial numbers, as to which the note which we have copied refers specifically to bonds numbered 205 to 210, each inclusive; and the other notes involved in this litigation likewise refer in the same way to other bonds contemplated by the mortgage according to specified serial numbers.

It will be observed that the body of each note pledges the bonds named in it, or the proceeds thereof, to its payment, with the additional provision that, in case the note is not paid at maturity, the corporation agrees to deliver $6,000 of its first mortgage bonds to the owner of the note as security therefor within a reasonable time after the same shall have been authorized by the board of railroad commissioners. While this does not in terms require the delivery of the precise bonds named in the note, nevertheless it cannot be questioned that, if, at the time this bill was filed, the bonds so named had not been disposed of, as in fact they had not been, they were pointed out as the bonds as to which the holder of the note might claim a specific right. The certificate on the note departs somewhat from the terms of the note itself, in that it provides that the bonds named, or what might be received therefor, should be delivered to the holder as soon as they were engraved and certified, without any stipulation for delay until the note came due. Therefore, on the whole, putting together the note and the certificate, it is plain that the holder had an option to demand that the specific bonds named should be delivered to him as soon as issued, or the proceeds thereof paid to him, thus putting it beyond doubt that the holder was entitled to a lien on those specific bonds, or the proceeds thereof. Thus the property as to which the lien was contemplated was specifically identified.

In view of the facts stated by the learned judge of the Circuit Court, in connection with those to which we have referred, it is difficult to perceive any stronger equity than that raised on this appeal in behalf of the complainant. Here we have a stipulation that certain funds should be advanced in the construction of the railway of the corporation involved, and that, as soon as the details of the issuing of the mortgage bonds could be worked out, specific bonds, or the proceeds thereof, should be delivered to the holders of the notes given for the advances, either as collateral or payment, as the case might be. Under the circumstances, the complainant claims, first, that it is entitled to be admitted to share pro rata with the holders of the $150,000 of bonds of which we have spoken; or, second, that in the distribution of any surplus proceeds of the property of the corporation in question, not re-

Digitized by Google

quired to satisfy such $150,000 of bonds, the complainant should have priority over the general creditors. Independently of the peculiar circumstances to which we will refer, what difficulty stands in the way of the complainant's first proposition? With regard to all liens of this character, equity proceeds on very broad principles to give effect to what has been fairly agreed to be done, so far as it can accomplish a result without injustice to others than the parties directly concerned. We have shown that, by the terms of this mortgage, which gave full notice to the holders of the outstanding bonds, no such injustice can be done. We have also shown that the equities of the case are supported by the fact that the funds of the complainant went into the property, under the express agreement that it should share in the security thus created by the use of what was thus advanced.

An illustration of the extent to which equity goes in this direction is the fact that, while it is often held that mortgages of after-acquired property are not valid in law, they are generally held to be valid in equity, provided the property is sufficiently pointed out and afterwards comes into existence under the terms of the intended security. The general rule in this respect has been stated often by the Supreme Court, although applied specifically to mortgages covering railroad supplies and rolling stock, which, in a certain sense, are incidental to the franchise of the corporation. Pennock v. Coe, 23 How. (U. S.) 117, 127, 16 L. Ed. 436; Irrigation Company v. Garland, 164 U. S. 1, 15, 17 Sup. Ct. 7, 41 L. Ed. 327. Jones on Chattel Mortgages (4th Ed. 1894), 202, 203, lays down like broad propositions as the settled American doctrine; and it cites decisions of the Circuit Courts which have long been accepted as of very high authority, establishing this as the rule of federal tribunals, although we think the Supreme Court has never in fact applied it except to the incidental property of railway corporations. It must also be admitted that, where there is an incomplete attempt to give security on existing property, equity will give relief. Fry on Specific Performance (4th Ed. 1903) p. 22, states the rule unqualifiedly and positively as follows:

> "Again, the court will specifically enforce a contract to execute a mortgage, and that even with an immediate power of sale, where the money has been actually advanced either before or at the time of the contract."

The author adds that specific performance will not be granted where the money has not been advanced in fact, neither to enforce an agreement for such an advance. This is undoubtedly the general rule, although possibly it would not apply to some exceptional cases, like those of quasi corporations which have agreed to furnish aid towards public utilities already initiated. However, that particular topic does not concern this case. The rule of so much of the text as we have cited was applied unhesitatingly by Vice Chancellor Wickens, in 1871, in Ashton v. Coryton, L. R. 13 Eq. 76, and by Lord Chancellor Selborne, in 1872, in Hermann v. Hodges, L. R. 16 Eq. 18; and the principle involved was made use of, with a thorough discussion and favorable observations, under circumstances substantially the same as those at bar in Walker v. Brown, 165 U. S. 653, 654, 656, 17 Sup. Ct. 453, 41 L. Ed. 865.

Therefore, it may be that there would be no difficulty in sustaining the complainant's bill except for a peculiar obstacle which seems in-

Digitized by Google

superable. The opinion of the learned judge of the Circuit Court observes that under the laws of Massachusetts this corporation could not issue bonds without the approval of the board of railroad commissioners, and makes reference to sundry statutes, of which we need cite only section 23 of chapter 112 of the Revised Laws of 1902. The opinion also observes as follows:

"The petitioner advances the proposition that under this trust indenture there may exist, not only legal bondholders, whose bonds have been authorized by law, but equitable bondholders under the agreements contained in these notes. For the court to accept this proposition would be to lay down the principle that a street railway company in Massachusetts may first execute a mortgage, and then, in direct violation of the state statutes, may proceed to issue bonds to the amount named in the mortgage under the form of contracts embodied in its promissory notes. This is in effect taking the control of street railways out of the hands of the state, by permitting them in this way to annul the laws which the state has passed for their proper regulation."

We are forced to agree with these observations, and they seem to leave us nothing except to affirm the judgment of the Circuit Court. What is involved in the line of statutes concerning this matter is a deep-seated, clearly implied, public policy, intended to protect the community, and incidentally both secured and unsecured creditors. The statute which we have named requires that no bond be issued except, of course, by a vote of a majority in interest of the stockholders of the corporation, which condition, perhaps, is sufficiently covered in this record. Nor can they be issued until the board of railroad commissioners is satisfied that the value of the property of the corporation, "excluding the value of the franchise, * * * taken at a fair value for railway purposes, * * * equals or exceeds the amount of the capital stock outstanding and the debt"; nor until the board, "after an examination of the assets and liabilities of the company, and such further investigation as it considers expedient, shall by vote approve their issue."

Proceedings under the line of statutes to which the section quoted relates have never been merely formal, but, according to the practice, they are not completed until after due notice, public hearing, and a solemn adjudication. Indeed, this section requires a formal vote by the board, to be passed "after an examination of the assets and liabilities of the company, and such further investigation as it," that is, the board, "considers expedient." All this emphasizes the fact that this legislation is in line with a deep-seated public policy, which, inasmuch as the corporation involved is purely local, we could not in any way disregard with reference to either a formal or an equitable mortgage, or to any attempt to authorize the complainant to share with the holders of the bonds already issued, or even to protect it by a lien on the property in excess of their claims. Any attempt in either direction would be equally violative of the local statutes appertaining hereto.

It is true that it is settled that a court proceeding in bankruptcy, or for the purpose of winding up insolvent estates in any method, may lay hold of the value of seats in stock exchanges, notwithstanding transfers of them require the approval of the officers of the exchanges. Such a condition, however, involves no rule of public policy. It is also true that, in Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51

Digitized by Google

L. R. A. 292, decided by us on June 15, 1900, we authorized the court in bankruptcy to lay hold of the proceeds of a license for the sale of intoxicating liquors, issued in accordance with the statutes of Massachusetts, notwithstanding the same could be transferred only by authority of the commissioners. It appeared, however, in that case that the commissioners were accustomed to grant authority for such transfers, unless there was some special reason to the contrary, and that in that way licenses had proved of substantial value, yielding sometimes from $4,000 to $5,000. However, we made no attempt to avoid the statutes of the state, because a transfer had been lawfully approved, and we dealt only with the proceeds thereof. Therefore, such classes of cases are of no assistance here.

It is also true that, if the corporation involved here were still an active one, we might, on a bill in equity framed therefor, but otherwise like that at bar, compel it to apply to the board for authority to issue the bonds asked for. But this corporation went into the hands of a receiver before this bill was filed; and there is no allegation that the circumstances are such as would call upon the commissioners to authorize any further lien, because there is no allegation that the property of the corporation would, as required by the statute we have cited, at a fair value for railway purposes, equal or exceed the amount of the outstanding capital stock and debt. On the other hand, the whole case is based on the hypothesis that the corporation is insolvent, without sufficient assets to pay its creditors, much less to divide anything to its stockholders. It is defunct and powerless, and incapable of acting under orders from a court sitting in equity, or of receiving the recognition of the board of railroad commissioners for any purposes involved in this litigation. On the whole, we find no method by which the difficulty stated by the learned judge of the Circuit Court can be overcome.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

LOWELL, Circuit Judge, concurs in the result.

On Appeal from Clerk's Taxation of Separate Costs for the Several Appellees Who Appeared Separately and Filed Separate Briefs.

PER CURIAM. In this case the clerk taxed separate bills of costs for each of the several parties appearing as appellees, and an appeal was taken to us, claiming that only one bill should be taxed. By analogy to the implication of equity rule 62,[1] the taxation by the clerk must be sustained.

The appeal is dismissed.

[1]Equity Rule 62.—When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

Digitized by Google

(152 Fed. 961.)

NEW AMSTERDAM CASUALTY CO. v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Sixth Circuit. March 21, 1907.)

No. 1,593.

INSURANCE—EXTENT OF LIABILITY OF INSURER—INDEMNITY INSURANCE.

A policy, issued by a casualty company, insured against loss from liability for damages on account of bodily injuries accidentally suffered by any person caused by the negligence of the assured, "and against the expense of defending any suit for such damages." It limited the company's liability arising from the injury or death of one person to $5,000, and provided for notice to the company of any injury and any claim or suit for damages therefor, that the company should defend or settle any such suit, and prohibited the assured from making any settlement or incurring any expense or interfering in any negotiations for settlement or in any legal proceeding without the company's consent. *Held*, that the limitation did not include the costs and expenses of a suit on a claim for damages for the death of a person which was defended by the company pursuant to the terms of the policy, and that on recovery of a larger sum by the plaintiff therein the assured was entitled under the policy to be reimbursed for the costs and expenses which it was compelled to pay in addition to the $5,000 indemnity against the damages recovered.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

Clarence T. Boyd, for plaintiff in error.

Wm. L. Cranbery, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

SEVERENS, Circuit Judge. This is an action brought by the defendant in error, hereinafter called the "Telephone Company" against the plaintiff in error, hereinafter called the "Casualty Company," upon a policy of insurance—

"against loss from common law or statutory liability for damages on account of bodily injuries fatal or nonfatal, accidentally suffered by any person or persons not employed by the assured at or about any of the work of the assured described in the schedule indorsed hereon, caused by the negligence of the assured, and resulting from the work described in said schedule, and against the expense of defending any suit for such damages."

While the policy was in force, and on or about February 8, 1901, Thomas Ware, an employé of the Telephone Company was killed at the city of Owensboro, Ky., by coming in contact with a telephone wire resting upon the wire of the Electric Light Company in said city, heavily charged with electricity, and the provisions of the policy became operative, as follows:

"(1) The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing, with full particulars to the home office of the company at New York City, or its duly authorized agent. He shall give like notice, with full particulars, of any claim which may be made on account of such accident.

"(2) If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate no-

Digitized by Google

tice thereof shall be given to the company, and the company shall defend such suit in the name and on behalf of the assured, or settle the same.

"(3) The assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere with any negotiation for settlement or in any legal proceeding without the consent of the company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured, when requested by the company, shall aid in securing information and evidence and in effecting settlements, and in case the company calls for the attendance of any employé or employés as witnesses at inquests and in suits, the assured will secure his or their attendance, making no charge for his or their loss of time."

Notice of the accident was given by the Telephone Company to the Casualty Company. Suit was brought by the administrator of Ware against the Telephone Company for damages arising from his death under a statute of Kentucky, and notice of that was also given to the Casualty Company, and that company thereupon employed counsel to defend said suit in the name and on behalf of the Telephone Company, and upon the trial judgment was rendered against the latter company for $12,500 and costs. An appeal from said judgment was prosecuted to the Court of Appeals of the state of Kentucky, and final judgment was rendered against the Telephone Company by said Court of Appeals of Kentucky for the sum of $12,500 with interest at 6 per cent. per annum and 10 per cent. damages additional. The total judgment of the Court of Appeals of Kentucky, including interest, damages, and costs, amounted to $15,447.26, which was paid by the Telephone Company on November 25, 1903.

Of the expenses of the suit on the trial and the appeal the Casualty Company paid $989.45. The Telephone Company paid the costs of the plaintiff in that suit and other costs and expenses to an amount in all, which, upon the proportion of $5,000 to the entire judgment appealed from, as directed by the court below, resulted in a balance in favor of the Telephone Company of $1,167.98. The judgment was for $5,000 plus this balance of $1,167.98 with the interest thereon from the date of the judgment of the trial court in the Ware Case. Upon the trial, which was before the court without a jury and upon an agreed statement of facts, the Casualty Company contended that its liability under a limitation in the policy did not extend beyond the sum of $5,000, and that the judgment should be limited accordingly, without enlargement from the costs and expenses which the Telephone Company had incurred by reason of the suit. And it further contended that the $5,000 should be reduced by the $989.45, which it had paid of the expenses of the suit, as above stated. Both of these contentions were overruled by the court below, and the plaintiff in error renews them here.

The policy contained the following provision:

"(A) The company's liability as aforesaid arising from an accident resulting in injuries to or in the death of one person is limited to five thousand dollars ($5,000.00), and subject to the same limit for each person the total liability arising from any one accident resulting in injuries to or in the death of any number of persons is limited to ten thousand dollars ($10,000.00)."

And the Casualty Company contends that this limitation includes all the consequences of the accident, such as the expenses of a law-

Digitized by Google

suit brought to recover damages therefor. But we think, as did the court below, that when construed with the other provisions of the contract, as it should be, that is not its meaning. The insurance was against two kinds of liability—one of which was for damages on account of bodily injury sustained by any person, and the other was for expenses in defending any suit brought therefor. This last provision was not included in the first, and if it had not been expressly made, the insurance against the accident would not have included the cost and expenses of a suit to recover on account of it. They were not the necessary consequences of the accident, and so would not have been within the contemplation of the parties. For the same reason the restriction of the liability of the company in respect to injuries resulting from an accident would not extend to costs and expenses of a suit, for such language without more would not import that the parties had that subject in contemplation. And there is abundant reason shown by the contract why it would be most unlikely that the parties should intend such a limitation. By one of the conditions of the insurance, the Telephone Company was prevented from making any settlement, or incurring any expense, or interfering in any negotiation for settlement, or in any legal proceeding. If the Casualty Company should see fit to resist the claim, it could make any defense it pleased, hire such and as many lawyers as it wanted, and prolong the litigation to the last extremity. If its liability for the accident were converted into a fund for carrying on the contest, it could be done without the ordinary risks of litigation, and the only prospect for the assured would be in the remnant, if there should be any. A contract ought not to be construed to an absurd conclusion, if a reasonable one is possible. Moreover, a policy of insurance prepared with much care for the interests of the insurer should be construed favorably to the other party, if the language employed leaves the matter in doubt. These considerations lead us to think that when the Casualty Company reserved all power of control of the defence to actions brought by injured persons to establish the liability for the accident and recover damages, and insured the Telephone Company "against the expense of defending any suit for such damages," although it must needs be that the defense would be carried on in the name of the Telephone Company, and an adverse judgment would go against that company for damages and costs, yet in fact the Casualty Company would be defending the cause in its own interest, and for the purpose of performing its contract of indemnity against the expenses of any such suit; and at all stages of the litigation it would be for it to determine what expenses it would risk in the chances of defeating the claim.

It makes no difference that ultimately a larger liability was established against the Telephone Company than the limit of insurance, for the Casualty Company reserved the right to make the defense without regard to the amount claimed by the party injured by the accident, and the Telephone Company was as completely excluded in a case where the amount which might be recovered was as much as $25,000 as where it might not exceed $5,000. By its agreement it was ex-

Digitized by Google

posed to the hazard of the course which the Casualty Company might see fit to pursue. If the defense proved successful, the Casualty Company would have done no more than it had agreed to do. If unsuccessful, still that company had done only that. There is no room for holding that the liability of the Casualty Company for the expenses of making the defense were at all dependent upon the result of the litigation. The court below gave judgment to the plaintiff for the $5,000, and for only a proportionate part of the expenses of the defense, upon a theory of an equitable division between the parties. The Casualty Company has no ground for complaint. It was not entitled to deduct from the amount insured what it had paid in making the defense, and it was bound to make good to the Telephone Company the expenses which the latter had been compelled to pay because primarily liable.

The judgment must be affirmed, with costs.

(152 Fed. 964.)

BROWN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 61.

1. PRINCIPAL AND SURETY—BOND OF BIDDER FOR GOVERNMENT WORK—LIABILITY OF SURETIES.

A bond given by a bidder for government work conditioned that if his bid was accepted he would enter into a contract and furnish a bond for its performance within 10 days, or, in case of his failure to do so, the sureties would pay to the United States "the difference in money between the amount of the bid of said bidder so accepted and the amount for which the proper officer of the United States may contract with another party to do the work proposed, if the latter amount be in excess of the former," contemplates that, if the bidder fails to enter into a formal and binding contract in accordance with his proposal, the government may relet the work and enter into an essentially similar contract with another party, and then look to the sureties for indemnity to the extent of its loss. When such second contract is let, the measure of the sureties' liability is fixed at the difference in price under such contract and the bid of their principal, and cannot be affected by the fact that the contractor fails to complete the work and a third contract is made whether at greater or less cost to the government.

2. SAME—DEFAULT OF BIDDER—MEASURE OF SURETY'S LIABILITY.

Defendants became sureties on the bond of a bidder for a government contract for furnishing and laying in place toward the construction of a riprap breakwater such a quantity of stone "dependent upon the price per ton of stone bid" as could be furnished in place for $45,000; the bond being conditioned that if the bid was accepted and the bidder failed to enter into the contract defendants would pay to the United States the difference in money between the amount of the bid so accepted, and the amount for which the government might contract with another party to do the work proposed, if the latter amount should be in excess of the former. The bid was accepted, but the bidder failed to enter into contract, and the work was let under the same conditions to a second bidder at an increased price per ton for stone; the necessary result being that the second bidder was required to furnish a smaller quantity of stone. *Held*, that such fact did not render the second contract one for doing substantially different work from that proposed by the first bid, so as to relieve defendants from liability, but that they were liable for the value of the stone in

Digitized by Google

place which the government would have obtained under the first bid in excess of that which it obtained under the second at the price bid by their principal.

In Error to the Circuit Court of the United States for the Southern District of New York.

Writ of error by the defendants in the court below to review a judgment for the plaintiff.

H. E. Lippincott, for plaintiff in error.

F. W. Bird, Winfred T. Denison, and Henry L. Stimson, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. This in an action against Brown and Fleming as sureties on a bond executed to the United States. By the bond, they undertook that if the bid of Charles Frey, Jr., "herewith accompanying, dated June 12, 1899, for building a riprap breakwater at Larchmont Harbor, Long Island Sound" should be accepted within 60 days from the date of the opening of proposals therefor, Frey would, within 10 days after notice of such acceptance, enter into a contract with the proper officer of the United States to do the work proposed by said bid, at the prices offered by said bid, and in accordance with the terms and conditions of the advertisement inviting said proposals, and that he would give bond with good and sufficient sureties for the faithful and proper fulfillment of such contract; and they further undertook to pay to the United States, in case Frey should fail to enter into such contract or give such bond within 10 days after said notice of acceptance, "the difference in money between the amount of the bid of said bidder so accepted and the amount for which the proper officer of the United States may contract with another party to do the work proposed, if the latter amount be in excess of the former."

By the advertisement mentioned in the bond the government invited proposals from bidders for furnishing and laying in place toward the construction of a riprap breakwater such a quantity of stone, "dependent upon the price per ton of stone bid," as could be furnished in place for $45,000. The proposal or bid of Frey mentioned in the bond was to "furnish the riprap stone in place at 43 cents per ton." Frey's bid was accepted by the government; but, after due notification thereof, he failed to enter into the contract, and, more than 10 days after such notification having expired, the government readvertised the work and invited proposals similar to those originally invited, and, having accepted the bid of one Conkling pursuant thereto, entered into a contract with him. By the bid of Conkling he undertook to furnish the stone and lay it in place at the price of 51 cents per ton. Conkling partly performed his contract, but subsequently abandoned it; and thereupon the government contracted with Anderson & Murphy to complete the work, and they fully performed it.

Upon the trial both parties moved for the direction of a verdict, and the court directed a verdict for the plaintiff.

Digitized by Google

The assignments of error challenge merely the ruling of the trial judge in directing a verdict for the plaintiff. Most of the questions which have been argued by the plaintiffs in error are not presented by the facts of the case. The only contention which merits consideration is that the contract with the government made with Conkling was not one to do the same work which Frey offered to do by his proposal. If this is true, the amount for which the sureties became liable was not established upon the trial according to the mode provided for in their undertaking; that amount being the "difference in money between the amount" of Frey's bid and "the amount contracted for with another party to do the work proposed," and only nominal damages were recoverable.

It is the meaning of the undertaking that the sureties will be responsible that Frey will enter into a formal and binding contract pursuant to his proposal, and if he fails the government may relet the work and enter into an essentially similar contract with another party, and then look to the sureties for indemnity to the extent of its loss. The undertaking does not contemplate that if the second contract is not performed the government may enter into a third, and still look to the sureties for indemnity for the performance of the contract; but it contemplates that when the second contract shall be made the government is to rely for its protection against loss upon that contract, and the responsibility of the party who enters into it. It contemplates that, if by the second contract the government secures as favorable terms as it would have obtained by the original contract, no occasion for indemnity from the sureties can arise; but, if the terms are not as favorable, the occasion will arise, and the loss is to be measured by the difference in the contract prices of performance. It does not mean that if the second contract shall not be performed, and a third is made, the sureties are to be thereby released from their obligation. It does mean that, if by the terms of the second contract no apparent loss has accrued to the government, they are no longer liable; but, if by its terms an apparent loss has accrued, they shall be liable; and whether a third contract is made or not, or whether the government incurs a larger or smaller subsequent loss, or whether it abandons the work altogether, are matters of no concern to them.

The obligation of a surety is not to be extended beyond its terms, and it follows that if the contract made by the government with Conkling was not to do substantially the work which Frey proposed to do, the deviation precludes the government from establishing the amount of the loss.

It appears that the contract which Frey should have entered into would have required him to furnish 104,000 tons of stone, while the contract entered into with Conkling only required him to furnish 88,000 tons. Such a difference in the quantities of stone to be furnished would render the two contracts radically different were it not that the difference was created necessarily by the difference in the two bids for doing the same work. Both contractors by their bids promised to supply such a quantity of stone as at the prices per

Digitized by Google

ton mentioned by them, respectively, should amount to the sum of $45,000, and the difference in the quantities of stone results simply from the difference between their bids in the price per ton. Frey's bid at 43 cents a ton was equivalent to a proposal to furnish 104,000 tons. Conkling's bid at the price of 51 cents per ton was equivalent to a proposal to furnish 88,000 tons. The contract with Conkling was a contract to do the work proposed to be done by Frey; but with a limitation in quantity necessitated by the difference in the price. This difference was an incident contemplated by the undertaking of the sureties, and the purpose and object of the bond was to protect the government from any loss which might arise in consequence thereof.

Owing to the failure of Frey to enter into and perform his contract, the government obtained under the Conkling contract 16,000 tons less stone than it would have obtained from Frey. It was obliged to pay $45,000 for 16,000 tons less than it would have obtained by the terms of Frey's proposal. The phraseology of the bond is not happily chosen, but, read as it must be, with the advertisement and the proposal of Frey, which are annexed to and form a part of it, we are unable to doubt that it obligated the defendants to pay to the government the difference, at the price fixed in Frey's proposal, between the quantity of stone which he promised to deliver, and the quantity which the government was able to obtain by the Conkling contract. It follows that a verdict was properly directed for the plaintiff.

The assignments of error do not challenge the correctness of the computations adopted by the trial judge in directing a verdict, and consequently we are not called upon to consider whether or not the computation was correct.

The judgment is affirmed.

(152 Fed. 967.)

WILLIAM H. PERRY CO. v. KLOSTERS AKTIE BOLAG.

(Circuit Court of Appeals, First Circuit. April 18, 1907.)

No. 694.

1. COURTS—JURISDICTION OF FEDERAL COURTS—SUFFICIENCY OF RECORD.

While parties cannot confer jurisdiction on a federal court by consent, still where the jurisdictional facts are properly alleged, and thus properly appear on the record, and the parties proceed to trial on pleadings which go to the merits, and, particularly, when the jurisdictional facts are not subsequently put in issue by the defendant nor seriously denied, the case ordinarily will not be dismissed for want of jurisdiction, where the proofs do not create a legal certainty that it is not within the jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 155, 156.]

2. SALE—DELIVERY—PASSING OF TITLE.

Under a contract for the sale of a cargo of foreign iron to be delivered from the ship, custom house charges paid, the unloading of the iron on a wharf, from which it was being removed by the purchaser without any objection to the quality or quantity at the time of its loss, and the payment of the duties constituted such a delivery as to pass the title.

Digitized by Google

Appeal from the Circuit Court of the United States for the District of Rhode Island.

Walter H. Barney (Barney & Lee and James B. Littlefield, on the brief), for plaintiff in error.

Henry A. Wise (Gardner, Pirce & Thornley and J. S. & H. A. Wise, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. It is alleged in the declaration that the plaintiff Klosters Aktie Bolag, is a corporation duly created, established, and organized by and under the laws of the Kingdom of Sweden, a foreign state, and a citizen and subject of said foreign state, and that the defendant is a corporation and a citizen of Rhode Island. These allegations are quite sufficient to give the Circuit Court jurisdiction. To this declaration the defendant pleaded the general issue, and gave notice of a claim of recoupment; and the cause came on for trial upon the merits. The case, therefore, does not stand at all like one where a jurisdictional question is raised upon motion or upon pleadings in limine, when jurisdiction must clearly appear upon the record. During the course of the trial, and after the plaintiff had rested its case, the point was taken by the defendant that the plaintiff had not shown either the fact of incorporation or foreign citizenship. The plaintiff contended that jurisdictional proofs were waived by pleading to the merits; but, without deciding the question of waiver, the court opened the case, and the plaintiff introduced a paper of which the following is a copy:

(Translation.)

It is hereby certified that the Royal Patent and Registry Office has on the 6th day of September, 1897, granted registration of the Klosters Aktie Bolag and that in the register of Joint Stock Companies on the 11th day of September, 1905 is filed, that the Board of Directors with domicile at Klosters Brukin the parish of Husby in the government of Kopperberg consists of Mr. Carl Hartin Samuel Nisser, Manufacturer, at Stjernsund in the parish aforesaid, Mr. Harald Funch, Engineer, and Mr. Arvid Gustaf Mikael Hermarck, Manager, both at Stockholm, with Mr. Carl Wilhelm Nisser, Manufacturer, also at Stockholm as substitute, that the firm of the Company is signed by any and each of the members of the Board of Directors and that up to this date no other entry concerning the Board of Directors of the Company has been filed in the register of Joint Stock Companies.

Stockholm the 17th of April, 1906.

Ex Officio. [Signed] E. F. Bjorkman.

The defendant then proceeded by the introduction of evidence. After both parties had rested their case, the defendant took the point that the paper failed to prove the plaintiff to be a corporation, but did prove it to be a joint stock company in the nature of a partnership, and therefore did not sustain the allegation of jurisdictional facts.

This is not a case upon removal from the state court, but one instituted originally in the Circuit Court; nor is it a case where the plaintiff failed to sufficiently allege jurisdictional facts.

We do not deem it necessary to inquire or decide how far the authorities, which hold that pleading to the merits is a waiver of the ne-

Digitized by Google

cessity of the plaintiff's proving the existence of the corporation, tend to sustain the proposition that pleading to the merits is a waiver of a defective allegation of jurisdictional facts, because this case, in our view, does not stand at all upon that ground.

The federal courts being courts of special and limited powers, jurisdictional questions disclosed by the record are always open; and, if it turns out that the parties and the court have inadvertently overlooked points in the record which are fatal to the jurisdiction, the case may and ordinarily will be dismissed, either with or without motion. Still, while the parties cannot confer jurisdiction by consent, where the jurisdictional facts are properly alleged, and thus properly appear upon the record, and the parties upon pleadings which go to the merits, proceed to trial, and particularly where the jurisdictional facts are not subsequently put in issue by the defendant or seriously denied, the case ordinarily will not be dismissed for want of jurisdiction, and this is especially so where the proofs do not create a legal certainty that the controversy involved is not within the jurisdiction. Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729. See, also, Gubbins v. Laughtenschlager (C. C.) 75 Fed. 615; Railroad Company v. Quigley, 21 How. 202, 16 L. Ed. 73; Conard v. Atlantic Insurance Company, 1 Pet. 386, 7 L. Ed. 189; Evans v. Gee, 11 Pet. 80, 9 L. Ed. 639; Wickliff v. Owings, 17 How. 47, 15 L. Ed. 44; Deputron v. Young, 134 U. S. 241, 250, 10 Sup. Ct. 539, 33 L. Ed. 923; Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682; Blackburn v. Mining Company, 175 U. S. 571, 574, 20 Sup. Ct. 222, 44 L. Ed. 276.

The certificate of organization in Sweden was not strictly a part of the record of the Circuit Court. Upon the record the jurisdictional facts appear. The certificate is a part of the evidence in the case, and, if we were to assume that the issue in respect to the jurisdictional fact alleged in the declaration was open for proofs aliunde after the case was put upon trial upon the general issue and without any plea to the jurisdiction, we should have to hold that the articles of association, unexplained by evidence or by the law of the foreign country, did not create a legal certainty that the plaintiff was a joint stock company in the nature of a partnership rather than a corporation, as alleged in the record. The registration was granted by the Royal Patent and Registry Office, and the company apparently has a board of directors, which would indicate that it was in the nature of a corporation. The fact that registration was had in the registry of joint stock companies does not make it at all certain that the association was a joint stock company in the nature of a partnership rather than a corporation.

Entertaining the contention of the defendant, as to the effect of the certificate as a piece of evidence, so far as to see that it does not clearly disclose facts fatal to the jurisdiction, we need not consider or decide the general question, immaterial here, whether a jurisdictional allegation of fact, properly appearing in the record, can be opened at the end of a jury trial upon the general issue, in a case where, at such a stage of a trial, aliunde evidence clearly establishes facts fatal to the jurisdiction.

The line of cases beginning with Everhart v. College, 120 U. S. 223, 7 Sup. Ct. 555, 30 L. Ed. 623, which, upon reversal, permit the Circuit

Digitized by Google

Court to allow amendment of the allegation of citizenship according to the fact, are cases where the record itself did not show jurisdiction, and thus do not apply to a situation like the one in question here.

The remaining question relates to the merits of the case, where the point is raised that the title to the property had not passed through a necessary delivery. The contract was a contract of sale of 250 tons of Swedish charcoal iron ex ship, including custom house charges, etc.

Without regard to the question whether the title passed upon delivery of the release, we think it quite clear, upon the conceded facts, that unloading the entire cargo of iron in question upon the wharf, which was completed a considerable time before the loss, was a sufficient delivery to pass the title; and the defendant, without any objection as to the quantity or quality, having given orders to its teamsters to remove the iron, and having so far accepted the delivery as to remove it in part, it is too late to stand upon the position that the title had not passed. The duties having been paid, we do not think the fact that the custom house weighing was incomplete would control the status of the title as between the parties.

Judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

(152 Fed. 970.)

HYAMS v. FEDERAL COAL & COKE CO. et al.

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907.)

No. 673.

1. EQUITY—PROOFS—MODE OF TAKING.

   Judiciary Act Sept. 24, 1789, c. 20, § 30, 1 Stat. 88, authorizing federal courts to require a party to adduce his evidence orally in open court on final hearing was repealed by Rev. St. § 862 [U. S. Comp. St. 1901, p. 661], declaring that the mode of proof in equity causes shall be according to rules now or hereafter prescribed by the Supreme Court, except as otherwise specially provided.

2. SAME—EQUITY RULES—INSTRUCTIONS.

   Amendment May 15, 1893 to Equity Rule 67 [149 U. S. 793, 13 Sup. Ct. iii], providing that on due notice given as prescribed by previous order, the court may, in its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing does not authorize the court to require an unwilling party to so adduce evidence and forego his right to use the methods prescribed by the rule prior to amendment.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Clarksburg.

John W. Davis (G. M. Alexander and Davis & Davis on the brief), for appellant.

John Bassel and John M. Freeman (W. S. Meredith and Watson & Freeman on the brief), for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. This suit in equity was instituted by the appellant on December 26, 1905; the bill being filed in the

Digitized by Google

clerk's office on that day. Six days prior thereto complainant had given the defendant the Federal Coal & Coke Company notice that he would, on December 26th, present his bill to the judge of the trial court and move for the appointment of a receiver of all the property of said defendant. It is said in the brief of counsel for appellant that the motion for the appointment of a receiver was not made on that day, and we find in the record no order by the court showing that the motion was on that date made or continued. Counsel for the appellees, defendants below, appear to have believed that the motion was tacitly continued. On December 26, 1905, the answer of the defendants was filed.

On February 24, 1906, the following order was entered:

"Upon application of the defendants herein, it is ordered that the motion for a receiver in this cause, together with any other matters pertinent thereto, be set for hearing at Clarksburg, West Virginia, on the first day of March, 1906, and it is further ordered that the witnesses and written testimony, if any, shall be examined and offered orally at the bar of the court, instead of by depositions, upon the hearing of said motion.

"It is further ordered that a copy of this order be served upon the plaintiff or any of his counsel."

"Indorsements.

"Enter: Febry. 24, 1906, Alston G. Dayton, Judge."

It seems that the motion was not made under this order and on March 10th, a notice was served on counsel for complainant below reading as follows:

"Notice is hereby given you that application will be made to Honorable Alston G. Dayton, Judge of the District Court of the United States for the Northern District of West Virginia, at his office in Philippi, in said district, on March the 12th, 1906, to set the above-styled cause for hearing upon the application for the appointment of a receiver at Clarksburg, West Virginia, on March 22nd, 1906, and that an order be entered by him requiring that the evidence adduced in support of and against said application be offered orally at the bar of the court, in lieu of by deposition or depositions, upon such hearing.

Watson & Freeman,
"Bassel & Meredith,
"Counsel for Defendants."

In the meantime, on March 5th, the March rule day, complainant filed his replication.

On March 12th, the following order was entered:

"Due notice in writing having been given by the defendants to the counsel of the plaintiff or to one of them, that application would be made this day, March 12th, 1906, to set the above-styled cause for hearing at Clarksburg, in said district, on March 22nd, 1906, upon the application for the appointment of a receiver of the property of the defendant, Federal Coal & Coke Company, and notice in writing having also been given to counsel for plaintiff that the court would be requested to have the evidence for and against said motion or application adduced orally at the bar of the court, instead of by deposition or depositions, it is ordered that said motion or application for such receiver be heard at Clarksburg, in said Northern District of West Virginia, on March 22nd, 1906, and that the evidence be adduced orally at the bar of the court upon such hearing. To the action of the court in setting this hearing for said 22nd day of March, 1906, and requiring the evidence to be adduced orally at the bar of the court upon such hearing, the plaintiff, by counsel, objected."

Digitized by Google

On March 15th, the following notice was served on counsel for complainant:

"Plaintiff in the above-styled cause will take notice that defendants, will, on the 16th day of March, 1906, make application to Hon. Alston G. Dayton, Judge of the District Court of the United States for the Northern District of West Virginia, at his office in Philippi, West Virginia, to set down the above-styled cause for final hearing at Clarksburg, West Virginia, on March 22nd, 1906, as well as upon the application for the appointment of a receiver.

"Watson & Freeman,
"Bassel & Meredith,
"Counsel for Defendants."

On March 17th, the following order was entered:

"Application having been made this day to the Judge of the District Court of the United States for the Northern District of West Virginia, to set down the above-styled cause for final hearing at Clarksburg, in said district, on March 22nd, 1906, as well as upon the application for the appointment of a receiver, and it appearing that due notice in writing of said application has been given to John W. Davis, one of the counsel for plaintiff, it is ordered that said cause be set down for final hearing upon said date, as well as upon the application to appoint a receiver."

On March 22d, complainant filed certain affidavits, not necessary to be here recited, and a written objection setting out sundry reasons why a final hearing of the cause should not be had at that time. Thereupon, the complainant having adduced no evidence, the following final decree was entered:

"This day, March 22nd, 1906, came the parties, by their counsel, and thereupon the plaintiff, by counsel, objected to the final hearing of this cause on this day, and filed his affidavit in support of said objection, and thereupon, the defendants filed the affidavit of Charles Donnelly, president of the defendant Federal Coal & Coke Company in opposition to further delay in the hearing of the cause, and the plaintiff thereupon filed, in support of his objection to the hearing, the joint affidavit of John W. Davis and George M. Alexander, his counsel, and the affidavit of himself, which objections the court overruled and directed the cause to be heard, and thereupon the plaintiff filed his protest or statement of objections in writing to the hearing of this cause, all of which affidavits and protest are ordered to be filed and made part of the record herein.

"And thereupon the cause came to be finally heard this day and was argued by counsel, the plaintiff declining to offer any testimony, and thereupon, on consideration thereof, it is ordered, adjudged and decreed, that the plaintiff's bill be dismissed, and that the plaintiff do pay the defendants their costs herein.

"Indorsements.

"Enter: March 22, 1906. Alston G. Dayton, Judge."

Even if section 30, Judiciary Act Sept. 24, 1789, c. 20, 1 Stat. 88, authorized the federal equity courts to require a party to adduce his evidence orally in open court on final hearing under any and all circumstances, this statute was repealed by section 862 Rev. St. [U. S. Comp. St. 1901, p. 661]. Blease v. Garlington, 92 U. S. 1, 6, 23 L. Ed. 521. There is therefore, no statute which gave the trial court authority to require the complainant to adduce his evidence orally. The amendment to Equity Rule 67, May 15, 1893 (149 U. S. 793, 13 Sup. Ct. iii), provides that:

"Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court, on final hearing."

Digitized by Google

This language does not seem to us to authorize the court to require an unwilling party to thus adduce his evidence on final hearing. This rule gives the court a discretionary power to allow a party, or both parties, desiring so to do, to thus adduce evidence; but we find nothing to sustain the contention that this rule authorizes the court to compel an unwilling party to forego his right to use the methods authorized by Equity Rule 67 as it stood previous to this amendment. The language "may permit" cannot properly be held to mean "may require" or "may compel."

The propriety of the action of the learned trial court in ordering a final hearing of this cause prior to the expiration of three months allowed by Equity Rule 69 presents an inviting subject for discussion. But, following the usual practice of this court (sanctioned by what is said in the opinion in Mutual Insc. Co. v. Hill, 193 U. S. 551, 553, 24 Sup. Ct. 538, 48 L. Ed. 788), we refrain from expressing an opinion on a question not necessary to be decided in order to dispose of this appeal.

From what has been said, it follows that the decree of the trial court must be reversed, and this cause remanded.

Reversed.

(152 Fed. 973.)

THE OAK.

THE DAUNTLESS.

(Circuit Court of Appeals, Fourth Circuit. April 10, 1907.)

No. 719.

1. TOWAGE—CARE REQUIRED OF TUG.

A towing tug is not an insurer of its tow, and is bound only to the exercise of a reasonable degree of care and skill in the work undertaken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 11.]

2. SAME—SINKING OF TOW—UNSEAWORTHINESS.

A finding affirmed that the sinking of a barge, which was first in a tow of five, on a voyage from Baltimore to Norfolk, while passing into Hampton Roads through the Swash Channel, was not due to her grounding or to any fault of the tug, but to her unseaworthiness and inability to stand the strain as leading tow, where she was placed at the request of her master; it being shown that the master of the tug was a competent and careful navigator, that he took the usual channel, and that the tug and other tows which were of equal or greater draft passed safely.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

In Admiralty.

For opinion below, see 148 Fed. 1005.

This libel, in admiralty, was instituted to recover for the loss of the barge Oak, and her cargo of fertilizer, alleged to have been caused by the negligent and unskillful navigation of the steam tug Dauntless, which had undertaken to tow the barge from Baltimore to Norfolk. The barge sank about 10 o'clock in the morning in the Swash Channel of the Thimble Shoal, about one mile west of the Thimble Light, near the entrance to Hampton Roads. The steam tug was in charge of a very experienced master of high reputation for competency and had a full complement of officers and crew, and with five loaded barges in tow left Baltimore bound for Norfolk on March 14, 1905. The tow con-

Digitized by Google

sisted of five barges; the first one being the Oak, which sank, and with her cargo was a total loss. She was next to the tug on a hawser about 600 feet long, and the other four barges were on cables of about 450 feet in length, so that including the length of the hawsers and the boats it was about one-half a mile from the stern of the tug to the stern of the last barge. The tug was one of the most capable in use for towing on the Chesapeake Bay, and had frequently proved herself able to manage similar and even heavier and longer tows. The Oak was placed next to the tug at the head of the tow by the express desire of her captain, who insisted on having that place. On account of snow, they put in to Annapolis the first night and anchored, and when the weather was favorable they proceeded until they arrived off the Patuxent river, when, the weather being threatening, they again made harbor until the morning. They then proceeded until the morning of the 19th, and on that morning about 7 o'clock they were abreast of Back river, and, as the master testifies (and in this he is corroborated by disinterested witnesses) from 2½ to 3 miles distant from Back River Light. There was then a good breeze from east southeast, but not sufficient to excute apprehension, and no indication of a storm. The wind, however, did increase as they proceeded until it blew 20 miles an hour, and later it increased to 25 or 30 miles. From the point abreast of Back river, the master of the tug testifies that he steered by landmarks which were visible, and with which he was very familiar, and by which, through many years of experience in navigating tugs and tows of a similar draft of water, he had found had always brought him safely through the Swash Channel of the Thimble Shoal, which channel is at least 1,000 feet wide with 13 feet depth at mean low tide. He testified that, as he proceeded southwardly from Back river on account of the southeast wind meeting the ebb tide, the water grew rougher, but not sufficiently so to suggest that the barges were in any danger, and that, even if it had occurred to him that it was expedient to seek a harbor, there was none nearer or more accessible than Hampton Roads, for which he was then making a direct course.

The master of the tug testified there was no indication that the barge Oak was in distress until about 20 minutes before she sank, when the lookout who was watching the barges reported that the barge Oak was making a signal, and looking back the master saw the Oak's stern was under water, and her bow afloat, and that she had grounded. He stopped the tug, and the other barges ran up alongside of him and anchored. The master testifies that he sounded the depth of water when the tug stopped and found 18 feet depth, and sounded where the barge was sunk and found 14 feet.

The tug drew 11½ feet and the barge Oak drew from 9 to 10 feet forward and 11 feet aft, and none of the other four barges drew less than 11 feet, and some a few inches more. The master of the tug testified that the tow made no leeway, for the reason that the ebb tide tended to carry them to the eastward, while the wind tended to drive them westward, and that the tide was the stronger influence, as the barges were deeply ladened in the water and presented very little freeboard surface to the wind. It was fully proven that the barges followed directly after the tug. The depth of water at the time of the sinking of the barge was greater than shown on the chart, which is calculated for mean low tide, because it was then the early ebb, and the water was kept back from running out by the strong wind from the sea.

It was charged as a fault against the tug that she took a course through the Swash Channel, when she should have gone in the deeper water on the seaward side of the Thimble Shoal; but the master testified, and was corroborated by several witnesses, that the Swash Channel was a safe channel, customarily used by all similar tows, and that by going outside by a longer route and through rougher water he would have imposed upon the tow increased risk for no sufficient reason.

The barge Oak was about 13 years old. She had been purchased as an old boat by Seward, the master, about five months before, and he was her sole owner, she was placed at the head of the tow next the tug by the express desire of the master, who wished to avoid the labor of handling the hawser, which as to the first barge devolved upon the crew of the tug, but on the other barges falls upon the crews of the barges. Her position as head barge brought upon her the strain of hauling the four following barges, and has

Digitized by Google

some tendency, it was testified, to open the seams of an old boat. The testimony of several of the captains of the other boats in the tow was that the tow was proceeding in the course usually taken, and that they did not touch the bottom anywhere, and that they did not see anything to indicate that the Oak struck the bottom off Back river. There was a great deal of testimony that at the place where the barge Oak was found after she sank there was 14 feet of water. The testimony of the captain and mate of the Oak was that she first struck the ground while passing Back River Shoal, and then began leaking, and that when she reached the Swash Channel of the Thimble Shoal, a distance of two miles, requiring nearly an hour in time, her stern was well down in the water. It was not testified by any one on the tug or on the other barges that any signal on the Oak was seen until 10 or 15 or 20 minutes before she sank.

The faults alleged against the tug are: (1) That she took a course so near to Back River Light as to permit the barge to strike on the Back River Shoal and start her leaking; (2) that the tug did not regard her signal of distress; (3) that the tug did not go to the east of Thimble Light and into deeper water; or (4) return and anchor at the mouth of either Back river or York river.

The district judge held that the tug had not been shown to be in fault, and dismissed the libel. The libelant has appealed.

Edward R. Baird, Jr., for appellant.

John W. Oast, Jr., and Floyd Hughes, for appellee.

Before PRITCHARD, Circuit Judge, and MORRIS and DAYTON, District Judges.

MORRIS, District Judge. (after stating the facts). There were some 20 witnesses examined in open court and seen and heard by the district judge. It is a case, therefore, in which the findings of fact come to us with that strong presumption of correctness which attaches in admiralty to the findings of a judge who has seen and heard the principal witnesses. The findings of the District Court were that the allegation that the barge Oak first grounded on the Back River Shoal was not sustained; that the course taken by the tug was, under the existing condictions, the proper and customary one; that the master of the tug was an exceptionally prudent and experienced navigator; that the Swash Channel across the Thimble Shoal was over 300 yards wide, with sufficient depth of water for the barge Oak, and she sank in the channel; that, the accident resulted from the unseaworthiness of the barge and not from any fault on the part of the tug.

It seems to us that, independently of the presumption of correctness in favor of the findings of the District Court, the great preponderance of evidence in the record sustains them. There is, in addition, the significant fact, not in any way explained, that although the barge Oak was the leading barge, and next to the tug which drew 11½ feet, and that she was followed by four other barges, all drawing as much and some a few inches more than she, no one of the barges encountered trouble or suffered damage, except the Oak. The competency, skill, and prudence of the master of the tug being established, the sufficiency of the power of the tug being undisputed, the general safety and constant use of the route under similar weather and other like conditions being proved, it appears to us that even if the very improbable, if not impossible, theory, be adopted that in some way the head barge did strike on an unknown lump which the tug and the

Digitized by Google

other four following barges passed over without striking, still the tug would not be responsible. The tug is not an insurer, and there is not even required of her the highest possible degree of skill and care, but only the exercise of reasonable skill and care in accomplishing the work undertaken by her. The Margaret v. Bliss, 94 U. S. 494–496, 24 L. Ed. 146. In the recent case of Pederson v. John D. Spreckles, 87 Fed. 938–944, 31 C. C. A. 308, the leading cases applying this rule are collated, and it is not necessary to cite them here.

We think the decree was right, and it is affirmed.

Affirmed.

(152 Fed. 976.)

BUTLER v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 170.

RAILROADS—PERSONS NEAR TRACK—DEATH.

Intestate, an intelligent girl, 16 years of age, was struck and killed by an engine as she was walking along a cinder path at the ends of the ties, which path had been used by the public as a short cut from a street to a depot. There was a semaphore so located about half the length of the path that, if one passed on the side toward the rails, he would get so close to them as to be struck by a passing engine, and this was what intestate did, without looking behind her to see whether a train was approaching, though by getting over or under the semaphore wires, and walking on some rough stones for a few steps, she could have passed the semaphore on the opposite side in safety. It was not shown that the engineer was reckless or grossly negligent in operating the train, nor in failing to anticipate that decedent would walk inside the semaphore. *Held*, that decedent's act constituted a violation of Railroad Law N. Y. § 53 (Laws 1892, p. 1394, c. 676), prohibiting persons not employés from walking along railroad tracks, except where the same should be laid along or across streets or highways, in which case he shall not walk on the track, unless necessary to cross the same, and that defendant was therefore not liable for decedent's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1285–1296.]

In Error to the Circuit Court of the United States for the Western District of New York.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Western District of New York, which was entered upon a verdict directed by the court in favor of the defendant at the close of plaintiff's case. The action was brought to recover for the death of plaintiff's intestate, a bright intelligent girl, 16 years of age, who was struck by an engine operated by defendant while she was walking alongside of that part of its track which runs diagonally across a block in the city of Niagara from Niagara street to Second street.

S. Wallace Dempsey and King, Leggett & Brown, for plaintiff in error.

C. A. Pooley and Pooley & Spratt, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The railroad law of the state of New York (chapter 676, p. 1394, Laws 1892) provides:

Digitized by Google

"Sec. 53. * * * No person other than those connected with or employed upon the railroad shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same."

The piece of track in question was not laid across or along a street or highway, and at or about the place where deceased was struck it was not necessary for her to cross the same. There was evidence that a cinder path along and some two feet or more from the rails, originally intended for employés, had for a long time been used by the public as a short cut from the street to the depot.

The statute above quoted was considered in the state Court of Appeals, and it was held that—whatever might be the result of long user by the public of a crossing at a point not a street or highway—where the question concerns the user of a way along the track, no length of acquiescence could create a right of user by license or by sufferance in view of the statute, which was intended to protect the traveling public as well as the railroad companies. "It is not easy, if at all possible, to see how any right, as by license, could be acquired through acquiescence to do something which was so clearly in violation of the statutory inhibition. Whoever walks upon or along the tracks of a railroad, except when necessary to cross the same, * * * violates the law, and is like a trespasser, and the company's servants are under no other obligation than to refrain from willfully or recklessly injuring him. * * * As it has been shown, the use was merely for convenience in making a short cut between the streets." Keller v. Erie R. R., 183 N. Y. 67, 75 N. E. 965.

The evidence shows that the cinder path which was outside the ends of the ties was at such a distance from the rails that a person walking on it would not be struck by any part of a passing engine or train. At about half the length of the path there was a semaphore so located that, if one passed it on the side towards the rails, he would get so close to them as to be struck if an engine were passing at the time. If, however, taking the trouble to get over or under the semaphore wires (it is not clear whether there were one or two of them, nor at what height from the ground) and accepting the inconvenience of walking on rough, broken stones, instead of cinders, for a few steps, he should pass the semaphore on its off side, he would be entirely safe. The evidence does not warrant a finding that the engine driver was reckless or grossly negligent in running his train along the path upon which a person was walking at a safe distance from the rails, nor in failing to anticipate that, when the semaphore was reached, the deceased would, without any glance behind to see what the conditions were, step from a position of safety to one of deadly peril.

The judgment is affirmed.

Digitized by Google

(152 Fed. 1021.)

THE ANN J. TRAINER. THE BAYPORT.

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907.)

No. 692.

1. COLLISION—STEAM AND SAILING VESSELS MEETING.

A steamer *held* solely in fault for a collision with a meeting schooner in the night near the mouth of Hampton Roads, where she saw the other vessel when two miles distant; it being her duty, as the burdened vessel and having ample sea room and fair weather, to so navigate as to avoid even danger of collision, and it not being established that the schooner changed either her course or speed until immediately before the collision.

2. SAME—SCHOONER AND ANCHORED STEAMER—ANCHORAGE IN CHANNEL.

A vessel anchored at night in calm weather as the result of a previous collision in Hampton Roads in the middle of the channel, which was there a mile or more wide for seagoing vessels, was not chargeable with violation of section 15 of Act March 3, 1899, c. 425, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543], prohibiting vessels from anchoring in navigable channels in such manner as to prevent or obstruct the passage of other vessels; and, where she carried proper lights, and kept an anchor watch who gave due warning by signals to an approaching schooner, the latter was solely in fault for a collision between them.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

In Admiralty. Suits for collision.

These were suits for collision between the Bayport and the Jackson, and the Trainer and the Bayport. The court below found the Bayport solely in fault for the former and the Trainer for the latter collision. From that decision this appeal is taken.

The opinion filed below, and here reprinted from 144 Fed. 896, was in full as follows:

WADDILL, District Judge. On the evening of the 25th of September, 1905, about 7:30 o'clock, the Bayport, an ocean-going whaleback steamer loaded with coal, while proceeding from the port of Newport News to the Virginia capes, at a point opposite Thimble Light, and a little to the northeast of midchannel, collided with the three-masted schooner Job H. Jackson, coming into Hampton Roads light, on a course west by half north en route to the port of Norfolk; the wind at the time being fresh, N. N. E., the night clear, and the sea smooth. As a result of the collision, the Jackson shortly thereafter sank, and the Bayport, while aiding in the rescue of the Jackson's crew, one of whom, the helmsman, was drowned, came to anchor. On the morning of September 26, 1905, about 3:30 o'clock, the three-masted schooner Ann J. Trainer, also bound into Hampton Roads, came into collision with the Bayport while thus at anchor.

These proceedings were taken in the following order: Williamson, master of the Job H. Jackson, filed his libel against the Bayport, and the latter subsequently filed her cross-libel against the Jackson; and thereupon, under admiralty rule No. 4 of this court, Dericksen, master of the Ann J. Trainer, filed his petition and libel in the first-

Digitized by Google

named suit; and subsequently the Bayport filed her cross-libel against the Trainer.

The court will proceed to dispose of the cases in the order of their filing.

(1) The Collision with the Jackson.

The faults assigned by the Jackson are, briefly: That while coming into Hampton Roads, having the right of way over the Bayport, she saw and observed, a little on her starboard bow, the green and range lights of the latter, at a distance of half a mile, approaching her, and proceeded steadily on her course, without changing the same, or altering her speed, until the vessels were within a very short distance of each other, when the Bayport suddenly shut in her green, and showed her red light about a point on the Jackson's starboard bow, and, after thus seeing a collision was inevitable, the schooner put her helm hard-aport, with a view of lightening the blow of the collision, and the Bayport, continuing on her course, struck her on the port bow near the fore-rigging, cutting into the schooner, causing her quickly to sink; the specific faults assigned against the Bayport being failure to keep an efficient lookout, an inefficient navigator, failure to keep her course and failure to give proper signals as to her movements, the effort to cross ahead of the schooner, improper change in course, failure to allow sufficient margin for safe navigation, and keep out of the way of the schooner. The Bayport, on the other hand, says that, in coming down the roads, she observed the schooner Jackson at a distance of two miles off, showing her green light on her starboard bow, and she continued on her course, believing that there was sufficient margin on the then courses of the two vessels for safe navigation; that suddenly, when about half a mile off, the Jackson shut in her green light and showed her red, when the Bayport immediately put her helm hardaport, sounded her danger signals, and stopped her engines, and reversed; that the schooner, instead of continuing on her course, again changed her course, shut in her red light, and showed only her green to the steamship; that, during this operation, the steamer's engines continued backing full speed, and, shortly before the collision, the schooner again changed her course, shutting in her green and opening her red light.

Upon this issue, a large amount of evidence was taken, and in many respects the conflict between the witnesses is irreconcilable as to the navigation of the two vessels at and about the time of the collision, but which need not be discussed in detail further than to say that the same has been fully considered, and, in the view taken by the court, it is quite clear not only from the evidence of the libelant, but as well that of the Bayport, that the collision resulted solely from the fault of those navigating the steamship. At the point of collision, the channel was at least a mile wide for vessels of this kind, the sea was open and unobstructed, and there was nothing in existing conditions respecting either the weather, wind, or sea to make a collision at all probable, to mariners exercising proper vigilance for safe and careful navigation of their ships. Under the rules of navigation, the Jackson was the favored vessel, and it was the duty of the Bayport to keep out of her

Digitized by Google

way; the corresponding obligation being imposed upon the Jackson that she should maintain her course and speed. While it is true that the collision may have occurred as contended by the Bayport, namely, that the Jackson, after several times showing uncertainty as to her movements, suddenly cut across her bow, and ran into the steamer, still this account is highly improbable (Haney v. Steam Packet Co., 23 How. 287, 16 L. Ed. 562), and is not supported by the evidence; and, moreover, the court would be slow, upon the Bayport's own showing, to condemn the Jackson. According to her navigators, the green lights of the Jackson were seen two miles away slightly on the former's starboard bow, and, while the Bayport had the right to navigate upon the theory that there would be no change in the Jackson's course, she should not have proceeded in such close proximity thereto as to endanger or run risk of collision, by reason of a sudden and unanticipated movement on the part of the approaching vessel, particularly where, as in this case, there was ample room for the vessels to pass each other in safety. The obligation to avoid risk of collision was imposed upon the Bayport from the time of sighting the Jackson two miles away, and, after she first changed her course according to the Bayport's contention, when about half a mile away, by shutting in her green and showing her red light, manifestly the Bayport should have made the proper maneuver to avoid the collision. It is true the rules of navigation (articles 20 and 23; Act Aug. 19, 1890, c. 802, 26 Stat. 327 [U. S. Comp. St. 1901, p. 2870]) contemplate that, when a steam and sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall, if necessary, slacken her speed, or stop or reverse. Still this does not mean that the burdened vessel must make this maneuver, if by so doing it would increase, instead of lessening, the chances of collision. When the Bayport observed the Jackson suddenly showing her red light half a mile away, taking it immediately across the steamer's course, she should have ported, and, if necessary, hardaported her wheel, and proceeded to starboard; and the sudden sounding of the alarm signals and backing and reversing, while it tended to change the bow of the steamer, also tended to keep her in her then position, or throw her further across the course of the Jackson. The Richmond (D. C.) 114 Fed. 208, 213, and cases there cited. Certain it is there were no such conditions existing at the time, and immediately preceding the same, as would excuse the Bayport for not avoiding the collision with the Jackson, seeing and observing her movements at the distance she admittedly did. To avoid the risk of collision, as well as the collision, was the obligation imposed upon her as the burdened vessel. The New York, 175 U. S. 187, 207, 20 Sup. Ct. 67, 44 L. Ed. 126; The Delmar (D. C.) 125 Fed. 130. The latter was a case of collision between a sailing vessel bound inward, and an outgoing tug with a tow, and which occurred virtually at the point of the collision now under consideration.

(2) The Collision with the Trainer.

Coming to the second collision, the Ann J. Trainer insists that the Bayport was improperly anchored, in that she was so located as un-

Digitized by Google

duly to obstruct and impede navigation at the point of collision, under the provisions of section 15 of Act March 3, 1899, c. 425, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543], and that her lights were not properly set and burning (article 11, Inland Rules); that she was without proper lookout or anchorage watch; and that she failed to give any proper signal or warning as to her location. Whereas, the Bayport contends that her place of anchorage was where she had the right to be, and that she was there as a result of the collision hereinbefore referred to with the Jackson, that she in no manner unduly obstructed or impeded navigation, and that, while she did not have her ordinary anchor lights, those set were the best that could be provided in the condition of the steamer after the first collision, namely, a light upon the after mast, suspended some five or six feet above the top of the pilot house, and 25 feet above the main deck, as an anchor light, which showed all around the horizon, also a light on either side of the top of the turret on the forward deck, and a light fastened to the broken mast 20 feet above the deck, some nine feet above the turret, which also showed all around the horizon; the lamp upon the after mast being the ordinary range light, and that upon the forward broken mast, the ordinary anchor light. Also had other lights showing from the cabin windows, and a fan-tail light suspended so as to light the companion way of the vessel; and, in addition, placed a proper anchor watch with directions to sound danger signals upon the approach of passing vessels. That the lights thus set were a substantial compliance with the rules of navigation, and in all respects sufficient to give notice of her position at anchor. And that the collision was brought about solely from the negligence and want of care on the part of those navigating the Trainer.

The act of Congress of March 3, 1899, supra, provides "that it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels or craft." Assuming that this section applies to channels of the character under consideration here, in the open bay, where the ship channel for ocean-going vessels was some mile or more wide, and for vessels of the draft of the Trainer, much wider (Northern Queen [D. C.] 117 Fed. 906–908, 914, 915), it may be said in passing that the trend of interpretation of the act has been to give it a liberal meaning, and that its purpose was not to prevent vessels from coming to anchor in navigable channels, but to forbid them from doing so in such manner as to obstruct said channels, or render their navigation difficult or dangerous. Hughes, Adm. 264; Northern Queen (D. C.) 117 Fed. 906, 913, supra; The Itasca (D. C.) 117 Fed. 885; The John H. Starin, 122 Fed. 236, 237, 58 C. C. A. 600; The Caldy (D. C.) 123 Fed. 802, 805; The City of Birmingham (C. C. A.) 138 Fed. 555, 559.[1] Be this as it may, however, and without intending specially to pass upon the meaning of this act, the Bayport should not be held to have been improperly anchored, or to have obstructed the channel on this occasion. She was about midway of the channel, with half a mile of water to each side of her for the deepest sea-going vessels,

[1] 71 C. C. A. 115.

Digitized by Google

and there was nothing in the conditions of weather, or otherwise, that made it unsafe or impractical for passing vessels to take either side in safety, in the exercise of ordinary care and prudence; and, moreover, her position was not one of choice on her part, but of necessity, she having been compelled to anchor there over night, because of the previous collision above referred to, which should, under the facts of this case, serve to relieve her from liability for the collision, so far as the question of anchorage is concerned. United States v. St. Louis, 184 U. S. 247, 255, 22 Sup. Ct. 350, 46 L. Ed. 520; Spencer on Mar. Collisions, § 111; The Indiana, 1 Abb. Adm. 430, Fed. Cas. No. 7,020; The Scioto, 2 Ware (Dav. 359) 360, Fed. Cas. No. 12,508.

Having reached the conclusion that the Bayport was without fault, under the circumstances of this case, so far as her place of anchorage is concerned, the question of the cause of the collision otherwise is to be considered. The evidence in this respect is not entirely free from conflict, but, in the judgment of the court, it largely preponderates in support of the Bayport's contention that she, after her anchorage, and at the time of the collision, had properly set and burning such lights as were sufficient to inform all persons properly navigating those waters of her location, and that she was at anchor; that she also had a proper anchor watch, and at the time of the collision, and for some minutes before, otherwise gave sufficient warning to the Trainer of her proximity, by sounding danger signals. One of the best evidences of the sufficiency of the lights displayed on the occasion in question, by the Bayport, was that the Trainer's lookout saw them a mile off, and so reported them; and, with this knowledge on the part of the Trainer, it was inexcusable for her to have collided with a vessel at rest. The anchored vessel, on this occasion, was the favored one, and all the presumptions as between it and the moving vessel are against the latter, and, while ordinarily a sailing vessel has the right of way over a moving steam vessel, it is not true as to one at anchor; and hence a sailing vessel is charged with the duty and obligation, upon seeing a white light ahead, to so navigate as not to involve risk of collision. It is indicative of danger ahead, and the presence of possible danger should keep other navigators on the alert.

It follows from what has been said that, for the collision with the Jackson, the Bayport was solely at fault, and should be held liable therefor; and, for that with the Trainer, the latter was solely at fault and should be held liable.

And decrees may be so entered.

Edward R. Baird, Jr., for appellant.

Floyd Hughes and Stephen R. Jones (Carver & Blodgett, on the brief), for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. After careful study of the record we are of opinion that the trial court decided this case properly. The opinion below accords so entirely with our views that it is hereby adopted as the opinion of this court. Affirmed.

Digitized by Google

(153 Fed. 163.)

KENTUCKY COAL, TIMBER, OIL & LAND CO. v. HOWES et al.

(Circuit Court of Appeals, Sixth Circuit. March 21, 1907.)

No. 1,631.

1. WRIT OF ERROR—TIME FOR BRINGING.

While a motion for new trial seasonably filed in an action at law in a Circuit Court prevents the judgment from becoming final until it is disposed of, time given for the allowance of a bill of exceptions has no such effect and cannot enlarge the time within which a writ of error must be brought, which, where the writ is returnable to the Circuit Court of Appeals, is limited to six months from the date of the final judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1889–1896.]

2. SAME—WHEN "BROUGHT."

A writ of error is not "brought" within the meaning of Rev. St. § 1008 [U. S. Comp. St. 1901, p. 715], until the writ is actually filed or lodged with the clerk of the court which rendered the judgment sought to be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1918.]

3. SAME—ORDER ALLOWING WRIT—CONDITION.

An order allowing a writ of error conditioned on the giving of a bond by the plaintiff in error is ineffective until the condition is complied with.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1915.]

4. SAME—ISSUANCE—DUTY OF CLERK.

A writ of error must be served, and such service is made by depositing it with the clerk of the court which rendered the judgment. While the clerk of a Circuit Court may issue a writ of error to that court, under the statute, as well as the clerk of the appellate court, upon an order allowing the same, it is not his duty to do so unless requested, but it is the duty of the plaintiff in error to apply for the writ and to deposit it for filing when issued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2105–2113.]

In Error to the Circuit Court of the United States for the Eastern District of Kentucky.

On motion to dismiss writ of error.

D. W. Steele, Jr., for plaintiff in error.

C. B. Wheeler and E. W. Hager, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This cause is now heard upon a motion to dismiss this writ of error, because not "brought" within the limitation of six months, prescribed by section 11 of the Court of Appeals act (Act March 3, 1891, c. 517, 26 Stat. 829 [U. S. Comp. St. 1901, p. 553]), after the date of the final judgment.

The judgment sought to be reviewed was rendered May 27, 1905. A motion for a new trial was not denied until September 5, 1905. This motion, having been seasonably entered, prevented the judgment from becoming final until disposed of. In re McCall, 145 Fed. 898, 76 C. C. A. 430; Aspen Mining Co. v. Billings, 150 U. S. 31, 14 Sup. Ct.

Digitized by Google

4, 37 L. Ed. 986. But no writ of error was filed with the clerk of the court until May 7, 1906, which was more than six months after the judgment became final. That the Circuit Court, from time to time, after the judgment became final, enlarged the time for filing a bill of exceptions, did not prevent the running of the time limit within which the writ might be "brought."

A pending application for a rehearing in an equity cause, or a new trial in an action at law, does suspend the time within which an appeal may be "taken" or a writ of error "brought" because neither the decree nor the judgment can be final until the motion is disposed of, and the time limit does not begin to run until the decree or judgment is final. But the allowance of a bill of exceptions has no effect upon the finality of a judgment and an enlargement of the time for filing cannot therefore affect the time limit for bringing a writ of error. But it is said that a petition for a writ of error was filed together with an assignment of error on October 24, 1905, and a journal entry made allowing the writ "upon the plaintiffs giving bond in the sum of $500.00." There is nothing in the transcript to indicate that this was ever prosecuted by giving the bond upon which the allowance of the writ was conditioned, or if so, that it was ever given within the time within which the writ must be brought. But, however this may be, no writ of error was ever filed with the clerk of the court until May 7, 1906, and this seems to have been issued because upon that day there was a second allowance of a writ of error by one of the judges of the court. A writ of error is not "brought," to use the verbiage of section 1008, Rev. St. [U. S. Comp. St. 1901, p. 715], within the legal meaning of the term until the writ is actually filed or lodged with the clerk of the court which rendered the judgment sought to be reviewed. "It is the filing of the writ," said Chief Justice Taney, in Brooks v. Morris, 11 How. 203, 207, 13 L. Ed. 665, "that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly. The day upon which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question." This case has been many times followed. Mussina v. Cavazos, 6 Wall. 355, 18 L. Ed. 810; Scarborough v. Pargoud, 108 U. S. 567, 2 Sup. Ct. 877, 27 L. Ed. 824; Polleys v. Black River Co., 113 U. S. 81, 5 Sup. Ct. 369, 28 L. Ed. 938; Mutual Life Co. v. Phinney, 178 U. S. 327, 335, 20 Sup. Ct. 906, 44 L. Ed. 1088. The principle applicable to writs of error applies also to appeals. Credit Co. v. Arkansas, etc., Ry. Co., 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448. But it is said that whether plaintiff filed a bond or not it was the duty of the clerk under the order allowing a writ of error, made October 24, 1905, to issue and file the writ before the limit for the bringing of the writ should expire, and that, when a plaintiff has done all that he is required to do, he should not be deprived of his remedy by reason of the fault of the clerk in not actually issuing and filing the writ in accordance with the order of the court. For this, counsel cite Mutual Insurance Co. v. Phinney, cited above, where it was held that the failure of a clerk to indorse a writ lodged with him as filed will not defeat the writ; the plaintiff having

Digitized by Google

properly and seasonably sued one out and left it with the clerk for filing.

The case does not apply to the facts of this cause for two reasons: First, the plaintiff did not do all that he was required to do; and, second, the clerk did not neglect any duty which the law imposed upon him. The allowance of the writ of error on October 24, 1905, was conditional upon giving bond. Plainly, it was ineffective until the condition was complied with. Nothing appears to show when, if ever, such a bond was given. The inference from a new allowance upon May 7, 1906, when a writ was filed, is that the allowance of a writ on October 24, 1905, was abandoned and never prosecuted. But assuming a bond to have been given in time, and that the plaintiff did not follow it up by obtaining a writ and delivering it to the clerk for filing, was it the clerk's duty to issue a writ and file it for the plaintiff in error, although not requested so to do? It must be remembered that the writ of error which is to deprive the Circuit Court of jurisdiction and to remove the record to the appellate court is the writ of the Supreme Court or of this court, according to the jurisdiction of those courts, and not of the Circuit Court, although the clerk of that court may actually issue it. Originally they issued only from the office of the clerk of the Supreme Court. But by statute enacted in 1792 it was provided that a form of writ should be prepared by the Supreme Court and copies placed in the hands of the clerks of the Circuit Courts to be issued upon application under the seal of that court. Mussina v. Cavazos, 6 Wall. 355, 18 L. Ed 810. This enactment is now carried into the Revised Statutes as section 1004 [U. S. Comp. St. 1901, p. 713], whereby it is provided that the writ may be issued either by the clerk of the Supreme Court or the clerks of the Circuit Courts. By section 11 of the Court of Appeals act, all of the existing provisions of law regulating methods of review are made applicable to the Circuit Courts of Appeal. Under this, writs of error, returnable to this court, may be issued from the office of the clerk of this court or the office of the clerk of the circuit court in which the judgment was rendered Northern Pacific R. R. Co. v. Amato (C. C.) 49 Fed. 881. The writ runs in the name of the President and bears the test of the Chief Justice. It is directed to the judges of the Circuit Court, and commands them to return, with the writ, into this court, a transcript of the record. Such a writ must be served, and it is so served when it is deposited with the clerk of the court in which the judgment was rendered. This deposit of the writ is its service, and the file mark, which it is the duty of the clerk to place thereon, is but evidence to show the fact of service and its date. It is clear that it is the duty of the plaintiff in error to apply for the writ, either to the clerk of this court or, if more convenient, to the clerk of the Circuit Court, and then it is his duty to deposit the writ, when issued, with the clerk of the Circuit Court. The clerk of the Circuit Court is under no greater duty to issue such a writ, without it is demanded by the plaintiff, than is the clerk of this court. Of course, for a neglect to issue the writ when requested an action might lie, but that it not the question here. Baltimore & O. R. Co. v. Weedon, 78 Fed. 584, 24 C. C. A. 249. The clerk was not requested to is-

Digitized by Google

sue this writ at any time prior to its actual issuance and was under no legal duty to do so without request.

The motion to dismiss the writ, because not "brought" within time is allowed.

(153 Fed. 166.)

UNITED STATES v. PEEKE.

(Circuit Court of Appeals, Third Circuit. April 22, 1907.)

No. 58.

CRIMINAL LAW—EXCESSIVE SENTENCE—CONVICTION ON DIFFERENT COUNTS.

Where a defendant has been convicted on different counts of an indictment charging separate offenses under the same statute, the court may impose separate and cumulative sentences upon the several counts, but a single sentence for a term longer than is authorized by the statute for one offense is void to the extent of the excess, and another court cannot cure the defect by apportioning the term upon the different counts, but after serving the lawful part of the term the prisoner may be discharged on a writ of habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3285, 3298–3300; vol. 25, Habeas Corpus, § 23.

Power of court to revise sentence, see note to Nichols v. United States, 46 C. C. A. 412.]

Appeal from the District Court of the United States for the District of New Jersey.

For opinion below, see 144 Fed. 1016.

John P. Nields, for appellant.

Scott Scammell, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and HOLLAND, District Judge.

HOLLAND, District Judge. This is an appeal from an order of the District Court of New Jersey discharging Erastus Carl Benedict Peeke from the state prison at Trenton on a writ of habeas corpus. Peeke was tried and convicted in the United States Court in the District of Delaware on the third, fourth, fifth, sixth, and sixteenth counts of an indictment charging him under section 5440, Rev. St. [U. S. Comp. St. 1901, p. 3676], with the crime of conspiring to commit an offense prohibited in section 5501, Rev. St. [U. S. Comp. St. 1901, p. 3709].

On August 2, 1904, the following judgment was pronounced against him:

"And now, to wit, this second day of August, A. D. nineteen hundred and four, the district attorney moves for judgment. And it appearing to the court that the jury has found the said Erastus Carl Benedict Peeke, alias Benedict Peeke, guilty in manner and form as he stands indicted in the third, fourth, fifth, sixth, and sixteenth counts of the indictment returned against him in the above-entitled cause on the twenty-fourth day of February, A. D., nineteen hundred and four, it is considered and adjudged by the court now here that you, Erastus Carl Benedict Peeke, alias Benedict Peeke, do forfeit and pay to the United States a fine of three thousand dollars and costs of this prosecution; and further that you, Erastus Carl Benedict Peeke, alias Benedict Peeke, be imprisoned in the New Jersey State Prison at Trenton, New Jersey,

Digitized by Google

for the term of five years, beginning on this day and ending on the first day of August, A. D. nineteen hundred and nine. And it is further considered, adjudged, and ordered by the court now here that you, Erastus Carl Benedict Peeke, alias Benedict Peeke, be now committed to the custody of the marshal of the United States for the district of Delaware in order that the foregoing sentence may be carried into execution."

After sentence, on the same day, he was delivered to the keeper of the New Jersey state prison, where he was confined as a prisoner until April 16, 1906, the date of his discharge.

In his petition for the writ he stated that sentence was imposed upon him "for a term of five years, beginning on this day (to wit, 2d day of August, 1904), and ending on the 1st day of August, 1909, and that, "according to the provisions of section 5440 and the conviction thereunder, the court was limited in its power to punish * * * to a period of imprisonment of not more than two years," and as a consequence the petitioner insists that he is unlawfully detained, and should be discharged. The prisoner was entitled to a reduction of time for good behavior provided for by section 5540 of the Revised Statutes. With this credit to which he is entitled a two-year sentence expired on the 11th day of March, 1906, upon which day he would be entitled to be discharged, if his contention be right as to the unlawfulness of the sentence imposed. The entry of the decree was withheld from April 6th to the 16th to allow time for the correction of the judgment by the court imposing the sentence, if the records warranted a correction. There being no amendments made, the prisoner upon the latter date was discharged, from which judgment an appeal was taken to this court, and a number of errors assigned, all of which can be disposed of in the consideration of the objections: (1) The Court erred in holding that the sentence was void except for the period of two years; and (2) the remedy of the prisoner, if any, was by writ of error, and not by habeas corpus. The petitioner was convicted under section 5440 for conspiracy to violate section 5501, in five different counts in the same indictment, and, it is contended, for five distinct offenses, for each of which offense section 5440 authorized the imposition of a maximum term of imprisonment of two years. The authorities cited by Judge Lanning are sufficient to show that cumulative sentences can be imposed in the federal courts (Ex parte Peeke [D. C.] 144 Fed. 1018), but, in order that a sentence should have this effect, it must be imposed in that form (United States v. Patterson [C. C.] 29 Fed. 775). Where there is a general verdict on two or more counts of an indictment charging crimes which are of the same character, although growing out of totally distinct and separate transactions, sentence may be passed and judgment may be entered for a specified term of imprisonment upon each count, which terms must be consecutive, and it is error to sentence for a certain period in gross. 12 Cyc. 962. Upon these five different counts of the indictment there is no doubt but that a term of imprisonment in the aggregate could have been inflicted by cumulative sentences of five years, or even ten; but this was not done. The judgment was a single sentence "for the term of five years, beginning this day (to wit, August 2, 1904) and ending on the 1st day of August, 1909." As

Digitized by Google

the maximum term for which the prisoner could be sentenced upon any count in the indictment was two years, this sentence is clearly excessive to the amount of three years, and to that extent null and void. If construed, as suggested by counsel for the government, to be five successive sentences of one year each, it would be entirely void. Section 5440 does not prescribe confinement in a "state jail or penitentiary," and section 5541, Rev. St. [U. S. Comp. St. 1901, p. 3721], prohibits imprisonment in a "state jail or penitentiary" unless the statute violated prescribes such imprisonment, or the sentence is for a period longer than one year. Mills Case, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107. If the prisoner, therefore, is to be detained for the full time of five years, there must be an apportionment of the time other than one year to each count. If we were to divide it into three successive sentences, the first for 2 years, the second for 1½ years, and the third for 1½ years, to which count of the indictment would we assign the different terms? The prisoner has already served two years, and it may be asked upon which count of the indictment did he serve this term, which count would cover the second period of confinement, and, after the expiration of that, to which count should we assign the last year and a half? These counts charge distinct conspiracies with different persons to violate section 5501. Should some newly discovered evidence induce the executive to pardon the prisoner on one or more counts, how would it be possible to ascertain to what part of the sentence the pardon applied? To what reduction from the five-year term would he be entitled? To state these questions is to answer them.

The District Court was not without authority for refusing to correct the sentence by assigning different parts of the term to separate counts in the indictment. In the case of Dimmick v. Tompkins, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110, the Supreme Court refused to apportion a sentence to two counts in an indictment, assigning one year to each.

The learned judge in the court below, after referring to this case, aptly says:

> "It is quite as impossible to construe the judgment now before me as one for imprisonment for five successive terms of one year each, or as one for any other number of terms of more than one year and not more than two years each, as it was for the Supreme Court to construe the judgment in the Dimmick Case as one for imprisonment for two successive terms of one year each."

It is undoubtedly a single judgment for a single term of five years, and, the maximum time for which the defendant can be imprisoned for any offense of which he was convicted in the five different counts being two years, the sentence is good to that extent (Goode v. U. S., 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297), and as to that part of the sentence in excess of the power of the court to impose it is void (In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149), and it may be dealt with in this proceeding without disturbing the valid portion of the sentence. U. S. v. Pridgeon, 153 U. S. 62, 14 Sup. Ct. 746, 38 L. Ed. 631. If we are correct, then, that the sentence is void for all time in excess of two years, that time having elapsed, any further confinement would be upon a void judgment and without warrant

Digitized by Google

of law, which entitled him to be heard upon a writ of habeas corpus, and he was properly discharged. In re Patterson, supra; U. S. v. Pridgeon, supra; In re Bonner, supra; Ex parte Virginia, 100 U. S. 343, 25 L. Ed. 676.

The order of the District Court of April 16, 1906, discharging Erastus Carl Benedict Peeke from the custody of the keeper of the New Jersey state prison at Trenton is affirmed.

(153 Fed. 169.)

In re UNITED EDUCATIONAL CO.

Appeal of PERKINS-GOODWIN CO.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 209.

SALES—DISTINGUISHED FROM PLEDGE—CORPORATE STOCK.

B., being desirous of reorganizing the business of K. & Co., who were indebted to claimant, organized the E. Company, of the preferred stock of which claimant agreed to accept $5,000 of K. & Co.'s indebtedness, with a bonus of 20 per cent. common stock, and agreed not to press the new corporation for the remaining indebtedness so long as claimant felt assured of its ultimate success, it being also agreed that B., through the new corporation, should sell to others the full preferred capital stock issue of the company and redeem within 18 months the preferred stock and bonus which claimant agreed to accept as a temporary arrangement to further a reorganization, but before this could be accomplished the new corporation became a bankrupt. *Held*, that claimant's arrangement constituted a pledge of the new corporation's stock as security for the debt of K. & Co., and not a sale of such stock.

[Ed. Note.—Rights and liabilities of pledgees of corporate stock, see note to Frater v. Old Nat. Bank of Providence, R. I., et al., 42 C. C. A. 135.]

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from an order confirming an order of the Referee in Bankruptcy which reduced the claim of the appellant—The Perkins-Goodwin Company—to to extent of $5,000. The Perkins-Goodwin Company filed a proof of debt against the United Educational Company, the bankrupt, for merchandise sold and delivered in the sum of $23,944.26. Upon an order for the re-examination of the claim the referee reduced the amount to $18,944.26 and his action was subsequently sustained by the District Court. The facts are fully set out in the opinion of the referee and need not be repeated here. Suffice it to say that the negotiations between the parties culminated in a letter, dated April 10, 1905, written by the Perkins-Goodwin Company to F. R. Boocock, representing the bankrupt, then about to be organized. This letter and the reply sufficiently state the agreement. It is as follows:

"Dear Sir: We understand that it is your purpose to organize a new company with a capitalization of $300,000, of which $100,000 is to be preferred stock, for the purpose of acquiring the business, assets and good-will of E. L. Kellogg & Co. and such other independent periodicals as it may appear wise and advantageous to secure. Of this preferred capital stock, we understand that you purpose underwriting $40,000 before the operation of the new company in order to provide cash working capital, but that the cash under this underwriting guarantee will not be available for a period of six months.

"In order that you may succeed in your purpose, we agree, upon submission to us of evidence that the $40,000 of preferred stock has been underwritten, to accept $5,000 of whatever amount E. L. Kellogg & Co. may now owe us or that may become due upon May 15th so long as the present indebted-

Digitized by Google

ness is not increased, in the 7% cumulative preferred stock of the new company with a bonus of 20% of common stock, and that we will not press you upon the remaining indebtedness so long as we feel assured of your ultimate success in the matter.

"It is understood, however, that you will sell through your own periodicals and other channels the full preferred capital stock issue of the new company and redeem within eighteen months the preferred stock and bonus which we thus agree to accept as a temporary arrangement to further your plans.

"We also understand that the assets of the new company will be sufficient to thorougly protect the preferred stock issue, that the earning capacity is reasonably certain to earn dividends upon the preferred stock, and that the employment of the total preferred stock issue as planned will not only entirely liquidate all assumed indebtedness but provide also substantial cash working capital."

About the middle of May thereafter the certificates of stock were delivered to the Perkins-Goodwin Company and, on June 2, 1905, Mr. Boocock, representing the bankrupt, wrote as follows:

"Perkins, Goodwin & Co., City—Gentlemen: Under date of April the 10th you addressed a communication to the writer agreeing to accept, provided he was successful in his reorganization of the E. L. Kellogg & Company, $5,000 of the preferred stock of the new corporation in exchange for a like amount of indebtedness of E. L. Kellogg & Co. We have completed our part of the arrangement by turning over to you the stock in question, and receiving your receipt therefor, and we take pleasure in confirming that paragraph of the letter in question relative to the purpose on our part to relieve you by sale in other directions within a period of eighteen months of the stock you thus accept."

Upon the failure of the United Educational Company to comply with the conditions of the letter of April 10 the certificates of stock were returned to its president December 12, 1905. The company was adjudicated a bankrupt on December 26, 1905, at which time it had not disposed of all its preferred stock.

Mortimer W. Byers, for appellant.

Charles D. Ridgway, for trustee in bankruptcy.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. We are unable to agree with the referee in thinking that the agreement, as expressed in the correspondence, amounted to an absolute purchase from the Educational Company of $5,000 of its preferred stock, the consideration being a reduction of its indebtedness to the Perkins-Goodwin Company to that amount, which purchase was fully consummated by the delivery of the stock. We are also of the opinion that the referee erred in construing the agreement to sell the entire amount of preferred stock and to redeem the $5,000 taken by the Perkins-Goodwin Company as the personal undertaking of Mr. Boocock.

On the contrary we think that, read in the light of the surrounding circumstances, the correspondence clearly establishes an agreement for an extension of credit for eighteen months with the stock as collateral security.

Our reasons for this conclusion may be epitomized as follows:

First. The stock was taken solely as an accommodation to the new company to enable it to get a successful start.

Second. The Perkins-Goodwin Company had been solicited and had declined to take stock in the new company in payment of the indebtedness, or otherwise.

Digitized by Google

Third. The express agreement to "redeem within eighteen months" and the acceptance of the stock as "a temporary arrangement to further your plans" are wholly incompatible with the theory of an absolute sale of the stock.

Fourth. It is true that the letter of April 10 was addressed to Mr. Boocock personally, for the reason that the new company had not then been organized. Subsequently Mr. Boocock became its present and general manager. The actual agreement was between the two corporations and the action of the Educational Company in delivering the stock was an acceptance of the terms stated in the letter of April 10 and a ratification thereof.

The transaction has all the attributes of a pledge. The Educational Company was to have eighteen months in which to pay its debt on condition that it transferred $5,000 stock as collateral and redeemed it within that time. The debt was not paid; the time of payment was extended but the obligation to pay remained.

The use of the words "and redeem within eighteen months the preferred stock and bonus" is inconsistent with the theory of an absolute sale.

"To redeem is defined as to purchase back; to regain possession by payment of a stipulated price; to repurchase; to regain, as mortgage property, by paying what is due; to receive back by paying the obligation." 24 Am. and Eng. Encyclopedia (2d Ed.) p. 214.

One member of the court is inclined to the opinion that the evidence tends to establish a conditional sale rather than a pledge, but as the same result, though by different methods, must be reached whichever theory is adopted, he concurs in the result.

The order is reversed with costs and the matter is remanded to the District Court with instructions to allow the claim of the appellant in full.

(153 Fed. 171.)

THE GOLDEN ROD.

(Circuit Court of Appeals, Second Circuit. April 4, 1907.)

No. 253.

1. MARITIME LIENS—STATUTORY LIEN FOR SUPPLIES—NOTICE.

The fact that notice of a lien filed under the New York statute for supplies furnished to a vessel did not contain the name of the owner of the vessel is immaterial and does not invalidate the lien, where prior to the filing of such notice the claimant had instituted a suit in rem to foreclose the lien in which the vessel had been seized by the marshal.

[Ed. Note.—Maritime lines, see note to The George Dunvois, 15 C. C. A. 679; The Nebraska, 17 C. C. A. 102; The Electron, 21 C. C. A. 21.]

2. SAME—TIME FOR FILING NOTICE—RUNNING ACCOUNT.

Where supplies of coal for a vessel were ordered and delivered at different times a bill being rendered after each delivery, the several charges do not constitute a running account, but each constitutes a separate and distinct cause of action, and to entitle the seller to a lien for any item under the New York statute notice thereof must have been filed within 30 days after such item was furnished or suit to enforce the lien must have been instituted within that time.

Digitized by Google

Appeal from the District Court of the United States for the Southern District of New York.

On appeal by the owner of the yacht Golden Rod from a decree of the District Court for the Southern District of New York condemning the yacht to pay a claim of $296.13 for coal supplied to the yacht between May 25, 1905, and June 22, 1905.

The facts fully appear in the opinion of the District Judge, which is reported in 145 Fed. 743.

Wilcox & Green, for appellant.

Wing, Putnam & Burlingham, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. We are satisfied with the finding of the District Judge that the agent of the purchaser on board the yacht had authority to bind her for necessaries and that a lien was created under the state statute for coal furnished by the libelant to the Golden Rod.

The proof shows that the coal was delivered on board the yacht in May and June, 1905, as follows:

May	25,	5	tons	$ 28 75
June	1,	10	"	57 50
"	9,	10	"	57 50
"	19,	5	"	28 75
"	22,	22½	"	123 63
				$296 13

The specification of lien was filed in the county clerk's office July 19, 1905. The libel was filed July 14, 1905, and it is stated, and not denied, that on that day the yacht was seized by the marshal and was actually in his custody.

The criticism of the claimant that the notice of lien as filed was defective, in that it did not contain the name of the owner, need not be considered, for the reason that, prior to the date of filing, the yacht had actually been taken by the marshal on process issued out of the District Court.

The statute gives the materialman a lien for thirty days and during that time, as to a portion of the coal at least, the lienor commenced foreclosure proceedings by an action in rem and a seizure of the yacht. This was notice to all interested persons and rendered the filing of specifications in the clerk's office an idle and unnecessary proceeding.

We fully approve the doctrine of the Niagara (D. C.) 31 Fed. 163, where it is said:

"The presumptive purpose of filing specifications, namely, to give notice to other parties interested in the vessel, would seem to be fulfilled by the filing of the libel and the custody of the marshal."

The first three items, as stated above, were furnished more than thirty days prior to the filing of the libel or the notice of the lien in the county clerk's office. As to them, therefore, the lien had expired unless they may be considered as part of a running account.

The libelant's president testified that he rendered a bill for the coal after each delivery. We are inclined to think that each was an in-

Digitized by Google

dependent transaction and that an action could have been brought after the rendition of each bill.

"An account current is an open or running account between two or more parties, or an account which contains items between the parties from which the balance due to one of them is or can be ascertained. from which it follows that such an account comes under the terms of an open account in so far as it is running, unsettled, or unclosed." 1 Cyc. 363.

In order to constitute a running account there must be an uninterrupted and connected series of transactions; if all the terms be agreed upon so that each item constitutes a separate and distinct cause of action in itself there is no running account.

In Rockefeller v. Thompson, 2 Sandf. 395 (N. Y. Super. Ct.) Judge Vanderpoel says:

"Miller, the clerk of the boat, testified that the boat wanted painting every week or two, and whatever was wanted to be done, they ordered the plaintiffs to do; that the painting of certain parts of the boat was done at different times; they would wear the part painted two or three months, and then paint it again. This gives a fair idea of the character of the work. It was palpably not the result of one entire and indivisible contract. The plaintiffs could have presented their bills and enforced their claims from time to time."

We hold, therefore, that there was no lien as to the first three items amounting to $143.75.

It follows that the decree must be reduced to the sum of $152.38 with interest thereon from June 22, 1905, and the costs of the District Court, and the cause is remanded to the District Court with instructions to enter such a decree. Neither party to recover the costs of this court.

(153 Fed. 173.)

OLD COLONY ZINC & SMELTING CO. v. CARRICK et al.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1907.)

No. 2,433.

VENDOR AND PURCHASER—RESCISSION OF SALE—FRAUD—TIME.

Complainant, having purchased a lead and zinc mine in July, 1902, discovered in April, 1903, that its agent had been corrupted by the vendors, and that complainant had been induced to pay $7,000 more for the mine than the owners deemed it worth. With this knowledge, complainant brought suit to recover the amount alleged to have been wrongfully paid to its agent and made a claim against the vendors for the overpayment, but no notice of rescission for fraud was given to the vendors until August, 1904, and suit was not brought for such relief until September of that year, during which time complainant treated the mine as its own and operated the same changing the status of the parties and condition of the property in such a manner as to disclose a purpose to waive the fraud and affirm the sale. *Held*, that complainant was not entitled to a decree for rescission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 213.]

Appeal from the Circuit Court of the United States for the Southwestern Division of the District of Missouri.

Digitized by Google

George Hubbert and C. V. Buckley, for appellant.
Thomas Dolan, for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a suit in equity to set aside a deed and rescind the sale of a lead and zinc mine for fraudulent misrepresentations by the vendors touching the value of the mine and for alleged corruption by them of the agent of the vendee who was deputed to examine and report on its value. We need not stop to consider whether any such representations were made, and, if made, whether they were of the character which entitled the vendee to equitable relief, or whether the agent of the vendee was improperly approached and influenced by the vendors. The facts of the case clearly show that the appellant, who was complainant below, conducted mining operations, speculated on the chances of finding valuable mineral, and postponed beginning its action to rescind the sale so long after the discovery of the alleged wrongdoing by defendants that it now has no standing in a court of equity to obtain the relief sought by the bill. The mine was purchased on July 28, 1902. From that time until August, 1905, when the president of complainant company gave his testimony, the mine was continuously operated by the vendee, and, so far as this record discloses, is now being so operated. He testified that he found just enough encouragement to cause him to keep on mining; that he continued prospecting, drilling, and drifting, and occasionally struck fairly good bodies of ore. He admitted that he learned in April, 1903, that the company's agent had been corrupted, having received from defendants the sum of $2,000 for exerting his influence in bringing about a sale to complainant, his principal; that he then learned that his company had paid $7,000 more for the mine than the owners deemed it worth. He caused suit to be instituted against the agent to recover the $2,000 wrongfully paid him, and asserted a claim for and considered the advisability of instituting suit against the vendors to recover $7,000, which he denounced as their "graft." With all this knowledge he neither stopped work nor took any steps to rescind the sale for sixteen or seventeen months thereafter. In June, 1903, he wrote his attorney, Mr. Gray, as follows:

"If you and Mr. Buckley should judge that we are entitled at this late day to repudiate the sale, demand our money back, you will please advise us whether or not we should take a vote of our directors to that effect and give the defendant notice of it. Will the fact that we have continued to operate and develop the property for a month or two since we gained knowledge of the fraud estop us from rescinding the sale?"

And then, doubtless with a view of not committing himself irretrievably to follow his attorney's advice, he said:

"Possibly our board may not think best to rescind if we can, but it seems to me to make that attack with others, and later make choice for main reliance may be good tactics because it would be most likely to bring out a liberal offer of settlement."

With knowledge in April, 1903, of all the alleged fraud, plainly and unambiguously acknowledged by the president of the company in his letter of June, 1903, no notice of rescission was given to the defendants

Digitized by Google

until August, 1904, and this suit was not instituted until September, 1904, 17 months after adequate knowledge was acquired. Instead of asserting the right to rescind promptly upon discovering the fraud as required by a rule of equity universally recognized, the complainant waited 16 months before giving the notice of rescission or taking any steps in that direction. During this period it treated the mine as its own, conducted the usual operations, mined and sold ore, changed the status of the parties and the condition of the property, and in every way disclosed a purpose to waive the fraud and affirm the contract, notwithstanding the fraud. It asserted a claim against its unfaithful agent for $2,000 received by him from the defendants for his perfidy, and asserted a claim of $7,000 against the defendants, which it considered to be the amount paid for the mine over and above its value. Its conduct was consistent with the affirmation of the contract, notwithstanding the fraud and the recovery of damages occasioned by the fraud, and was totally inconsistent with the intention to disaffirm and rescind the contract by reason of the fraud.

Even the institution of this suit does not seem to have been the result of a definite purpose to exercise the right of rescission. It appears rather to have been resorted to for the purpose of enforcing a settlement of its claims just mentioned. In the language of the president this suit was "good tactics, * * * most likely to bring out a liberal offer of settlement."

It is difficult to seriously discuss the right of a suitor to resort to a court of equity for relief on the facts and circumstances disclosed by this record. The case falls fully within the recent case of Richardson v. Lowe, 79 C. C. A. 317, 149 Fed. 625, decided by us and the cases therein cited, and is governed by the rules and principles therein announced.

The Circuit Court properly dismissed the bill, and its decree is accordingly affirmed.

(153 Fed. 175.)

CRAFT, Internal Revenue Collector, v. SCHAFER.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1907.)

No. 1,589.

INTERNAL REVENUE—OLEOMARGARINE LAW—POWERS OF COLLECTOR.

The oleomargarine acts (Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], as amended by Act May 9, 1902, c. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1905, p. 432]) are complete in themselves, only those provisions of the general internal revenue statutes which are expressly enumerated therein being applicable thereto; and a collector is not authorized to exact the penalty of 50 per cent. provided for by Rev. St. § 3176 [U. S. Comp. St. 1901, p. 2068], from a dealer for neglecting to make the proper return.

In Error to the Circuit Court of the United States for the Western District of Kentucky.

For opinion below, see 144 Fed. 907.

George Du Relle, for plaintiff in error.

Henry M. Johnson, for defendant in error.

Digitized by Google

Before SEVERENS and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

RICHARDS, Circuit Judge. This is one of a number of actions brought to recover back the taxes and penalties assessed and paid under what are known as the "Oleomargarine Acts." Retail dealers of oleomargarine are required to pay a special tax of $48 per year; but, if the oleomargarine be free from any artificial coloration which causes it to look like butter of any shade of yellow, the annual tax is only $6. In the present cases it was held, as a matter of fact, that the oleomargarine sold was artificially colored, and therefore subject to the special tax of $48 per year. The internal revenue officers, acting under supposed authority of section 3176 of the Revised Statutes [U. S. Comp. St. 1901, p. 2068], assessed a penalty of 50 per cent. on the tax, making the entire amount $72.

There is only one question for consideration, namely, whether this section applied, so as to authorize the assessment of the penalty mentioned. The court below held it did not, and in this conclusion we concur. The oleomargarine acts are complete in themselves. They either contain provisions of their own for the enforcement of the tax, or they incorporate such sections of the internal revenue laws as Congress thought ought to be made applicable. Section 3176 of the Revised Statutes was not one of those sections, or Congress would have said so, making it applicable in the enforcement of the oleomargarine tax. This has been the holding in Re Kearns, Collector (D. C.) 64 Fed. 481, and in Re Kinney (D. C.) 102 Fed. 468, not to mention other analogous cases.

It appears that, at the same time the government collected from certain dealers the tax of $48 per annum for selling artificially colored oleomargarine, it also collected the tax of $6 per annum for selling oleomargarine not artificially colored. The latter amounts should be refunded.

Judgment accordingly.

(153 Fed. 176.)

PAYNE v. KNICKERBOCKER TRUST CO.

(Circuit Court of Appeals, Third Circuit. May 6, 1907.)

No. 22.

PLEADING—ISSUES AND PROOF.

Where a special plea setting up the defense of fraud was properly stricken out as not sufficiently specific, the defendant is not entitled to introduce such defense under the plea of general issue by cross-examination of plaintiff's witnesses.

Appeal from the Circuit Court of the United States for the District of New Jersey.

H. L. Allen, for appellant.
Conover English, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

Digitized by Google

DALLAS, Circuit Judge. This assignment of errors presents no question requiring our decision which may not briefly be disposed of. The specification respecting the overruling of the demurrer to the declaration does not appear to be seriously insisted upon. It could not be maintained.

The learned judge was clearly right in holding that the second and third pleas were not specific enough. He properly exercised his discretion in striking them out, and as the fraud to which they referred was not again and more specifically pleaded, it is manifest that no error was committed in refusing to permit the defendant to irregularly introduce his supposed defense by cross-examining a witness of the plaintiff "with respect to the question of fraud, under the plea of general issue, which was the only plea of record."

The judgment of the Circuit Court is affirmed.

(153 Fed. 177.)

DEERE & WEBBER CO. v. DOWAGIAC MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. April 1, 1907.)

No. 2,436.

1. PATENTS—SUIT FOR INFRINGEMENT—PLEADING.

Under the rule that answers in equity must be full, unequivocal, and responsive to the bill, where a bill for infringement of a patent alleges past and present infringement, and that defendant then had on hand a large number of infringing machines which it was offering for sale, an answer which admits that defendant had previously sold a machine which had been adjudged an infringement, but alleges that it had ceased selling the same "long prior" to the beginning of the suit and returned the parts on hand to the manufacturer, and since "that time" had sold no machines of that character, is indefinite and evasive and not responsive, and must be treated as admitting the averment that defendant had infringing machines on hand which it was offering for sale.

2. SAME—DISCLAIMER OF INTENTION TO INFRINGE WHEN SUFFICIENT TO AVOID INJUNCTION.

Where the answer in a suit in equity for infringement of a patent denies the validity of the patent, and asserts the right of defendant to make and vend the machine covered thereby, and also by implication admits an allegation of the bill that it has on hand and is offering for sale a large number of infringing machines, a mere averment that it ceased selling an alleged infringing machine prior to the commencement of the suit, and has no intention of using or selling any machines embodying the features of the patent, not supported by any clear proof, is not such a disclaimer as will deprive the complainant of the right to an injunction.

3. SAME—INFRINGEMENT—GRAIN DRILLS.

The Hoyt patent, No. 446,230, for a grain drill, *held* valid and infringed.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Border Bowman (Paul A. Staley and Louis K. Hull, on the brief), for appellant.

Fred L. Chappell (Otis A. Earl, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a bill to enjoin infringement of letters patent No. 446,230, issued to Will F. Hoyt in 1891 for an im-

Digitized by Google

provement in grain drills and assigned to appellee, the complainant below, in 1894. The bill charged infringement in the past and a continuance of it at the time the suit was brought, and particularly charged that defendant had on hand at that time a large quantity of infringing machines which it was offering for sale. It further charged that the machines sold by defendant were the same in principle as those manufactured and sold by five other firms or corporations which had, in suits duly instituted against them, been judicially decreed by courts of last resort to be infringements of complainant's patent. The answer denied the validity of complainant's patent on all the statutory grounds, denied infringement, and in effect asserted the right to make, use, and vend any grain drills, notwithstanding complainant's patent. It then contained the following averments:

"Defendant, further answering, on information and belief, says that the alleged infringing device was sold by it and made in accordance with letters patent No. 497,864, issued May 23, 1893, for grain drills, on the application of E. Christman and W. G. Munn, but defendant avers that it ceased the sale of said grain drill long prior to the beginning of the present action; that all of the parts of said grain drills which were made in accordance with said letters patent or which had any resemblance thereto were returned to the manufacturers, and that no drills of that character were sold after that time; that since that time the defendant has sold a grain drill of an entirely different type, and one which does not in any sense embody the principle of the said Hoyt patent in suit or of the said Christman and Munn patent; that said defendant has no intention nor has had any intention of manufacturing using, or selling, or causing to be manufactured, used, or sold any grain drills embodying in any sense the features of said Hoyt patent or of the Christman and Munn patent, and as to these facts complainant was fully advised long prior to the commencement of this action."

The grain drill admitted to have been sold by defendant, constructed in accordance with the Christman and Munn patent, is one of the five alleged in the bill to have been judicially decreed to constitute, and one which this record shows to be an infringement of complainant's patent. Many of the last quoted allegations are so uncertain and indefinite as to be practically meaningless. There is an allegation that the defendant had ceased to sell that device a long time before this suit was brought, but how long, whether a week or a year is not disclosed; that no drills had been sold after that time; and that since that time defendant has sold a different drill, and one that does not infringe either complainant's or Christman and Munn's patent. The two latter averments depend for their accuracy of meaning upon what was meant by their antecedent, the long time first referred to. They depend upon the meaning given by the writer to a word of relative and variable significance whose accurate meaning can be understood only by contrasting it with some fixed standard, which is absent from this pleading.

There is no denial of the definite averment of the bill that defendant has a large quantity of infringing drills on hand which it was offering for sale, except such as inferentially arises from the averment of the answer that, when it ceased selling the Christman and Munn drill, it returned all the infringing parts of those drills to the manufacturer.

Digitized by Google

Answers in equity must be full, unequivocal, and responsive to the bill. 1 Ency. Pl. & Pr. pp. 875, 876. The indefinite, evasive averments of the answer in this case signally fail to respond to the requirements of that rule and well justify us in treating them as negative pregnants admitting the truth of the definite averments of the bill which are not fully answered. There next follows what is urged upon us as such a disclaimer of any intention to infringe as avoids the necessity for injunctive relief and requires the dismissal of the bill. A formal replication was filed; and on these pleadings and the proof hereinafter referred to the case was submitted for final decree.

The answer amounts to a vigorous assertion of the invalidity of complainant's patent and of defendant's right to make, use, and vend the device described in it; an admission by necessary implication from the pleadings that defendant had on hand at the time the suit was instituted a large quantity of infringing drills for sale; that it had actually infringed by selling the Christman and Munn drill; and that such an infringement had continued down to an indefinitely fixed time prior to the commencement of this suit.

The proof, it is conceded, establishes the validity of complainant's patent and negatives defendant's right to infringe its claims. The evidence relied on by defendant to establish the issue joined that it had discontinued infringement a long time before this suit was begun was given by witness Hoyt, the secretary and superintendent of complainant's company, and is very brief. On cross-examination he was asked and answered the following questions:

"Q. How many litigations have been conducted by your company for the infringement of this patent? A. I figure up eight different suits.

"Q. I understand from your testimony on accounting in the Brennan Case that, so far as you know, during the year 1904–05, none of these parties were infringing your patent. A. This is correct, as far as I know.

"Q. Mr. Hoyt, you have stated that eight different suits have been brought by your company involving this patent. Do you include with those the present suit against Deere & Webber Co.? A. I do."

All that can reasonably be understood from that testimony is that Hoyt did not know that the defendant had during the year 1904–05 infringed complainant's patent. Assuming that it was probable that the witness would have known if infringements had occurred during the time in question, the testimony is nevertheless indefinite and uncertain, and no pains seem to have been taken to make it clear. It obviously does not refer to any calendar year, but most probably to a business season for the sale of grain drills. So far as we know, that season might have begun in November or December of 1904, and all that the witness can necessarily mean by his testimony is that he did not know of any infringement by the defendant during a short period before this suit was brought, which the record shows was in January, 1905.

Taking the foregoing, the pleadings, and proof together, we have little to sustain the defendant's present contention that it had not for a long time infringed complainant's patent. It consists exclusively of defendant's unsworn and evasive allegations to that effect, denied by the complainant, and the vague and uncertain testimony of witness Hoyt.

Digitized by Google

The legal questions are therefore these: First. Where the validity of complainant's patent is denied, the right to infringe asserted, the possession of a large quantity of infringing machines admitted, and no satisfactory evidence adduced of cessation to infringe for any considerable time before the beginning of the suit, is the danger so threatening as to warrant injunctive relief? Second. Does the allegation in the answer that defendant does not intend to infringe any more prevent the granting of injunctive relief to the complainants, restraining the defendant from further infringement? We think in the light of the pleadings and proof just analyzed these questions are self-answering, but as they are earnestly argued by counsel we proceed to their consideration.

Whether a suit to protect a patentee in the use and enjoyment of his invention shall be at law or in equity is to be determined by the same principles as are applied in ordinary litigation. If he has an adequate remedy at law, he cannot resort to equity for relief any more than suitors in other departments of jurisprudence. Starting from this conceded standpoint, defendants contend that, when a patent has expired or when circumstances are such as not to entitle the patentee to injunctive relief against infringement, a court of equity will not entertain a bill for the sole purpose of an accounting for damages sustained by a past infringement or for profits realized by an infringer. This proposition is well settled (Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975; Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392; Woodmanse & Hewitt Mfg. Co. v. Williams, 15 C. C. A. 520, 68 Fed. 489; Brown v. Lanyon [C. C. A.] 148 Fed. 838),[1] and, relying upon it, counsel contend that because there is no showing of any recent or threatened infringement or any continuing trespass, such as imperiled complainant's rights, the court of equity had no jurisdiction over the case, and it should have been dismissed. If their premises were correct, their conclusion might follow; but their premises are not correct. We have already called attention to the uncertain character of the showing made by the pleadings and proof, concerning the time when the admitted infringement ceased, if it ever ceased, and have concluded that the showing does not confine it to a time very remote from the institution of the suit. It is left sufficiently near to warrant a well-grounded apprehension taken in connection with complainant's right to do so that it might and would continue its infringement in the future. The case is therefore brought within the general principle that warrants a court of equity in interfering to prevent threatened or continued trespasses upon complainant's rights.

Does the disclaimer warrant refusal of injunctive relief? Taking the allegations of the answer as a full and frank disclaimer of any purpose to further infringe complainant's patent, is it in itself sufficient to prevent equitable interference? When after some infringement and after conduct disclosing danger of a continued or renewed infringement a patentee finds it necessary to incur the expense of bringing a bill to protect his rights, he is entitled to all the remedies which the law affords him, and among them is a final adjudication of his rights and a permanent and effective injunction against further infringement, and he should not be driven from the court to

[1] 78 C. C. A. 528.

Digitized by Google

which he has rightfully resorted with a mere promise by the offender of better conduct in the future. Considering the likelihood that an infringement once practiced will be repeated as long as the wrongdoer believes he is right (as from the pleadings in this case the defendant appears to believe), we think the patentee is entitled to a more effective remedy than a mere promise of that kind. The authorities abundantly support this conclusion. Celluloid Mfg. Co. v. Arlington Mfg. Co. (C. C.) 34 Fed. 324; White v. Walbridge (C. C.) 46 Fed. 526; Sawyer Spindle Co. v. Turner (C. C.) 55 Fed. 979; Matthews & Willard Mfg. Co. v. National Brass & Iron Works (C. C.) 71 Fed. 518; New York Filter Mfg. Co. v. Chemical Building Co. (C. C.) 93 Fed. 827.

Some other questions are argued which, in our opinion, concern the accounting to follow and will be then more appropriately met and disposed of, and which, in consideration of the conclusions already announced, do not require present consideration by us.

The decree of the Circuit Court was correct, and it is accordingly affirmed.

(153 Fed. 181.)

WILLS v. SCRANTON COLD STORAGE & WAREHOUSE CO.

(Circuit Court of Appeals, Third Circuit. April 30, 1907.)

No. 6.

1. PATENTS—INVENTION—REFRIGERATOR BUILDING.

The Wills reissued patent, No. 12,300 (original No. 742,540), for a refrigerator building the essential feature of which is the use of flaps or other devices for closing the space between the elevator car and the sides of the shaft to prevent the escape of cold air from the refrigerating rooms when the elevator is in use, is manifestly void on its face for lack of invention.

2. SAME—SUIT FOR INFRINGEMENT—PATENT INVALID ON ITS FACE.

Where the invalidity of a patent for lack of invention is clear upon its face, the court may so declare it sua sponte, although the question is not raised by the pleadings, and may dismiss a bill for its infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 551.]

Appeal from the Circuit Court of the United States for the Middle District of Pennsylvania.

For opinion below, see 147 Fed. 525.

Herbert Knight and Edmund Wetmore, for appellant.

R. L. Levy, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and LANNING, District Judge.

GRAY, Circuit Judge. This is an appeal from a final decree of the circuit court for the middle district of Pennsylvania, dismissing the bill of the complainant-appellant. The bill claims infringement by the defendant of a certain patent for an improvement in refrigerator buildings, being Reissued Letters Patent No. 12,300, dated January 3, 1905. Defendant, in its answer, sets forth the defense of noninfringement, and upon issue joined, testimony in support of said de-

Digitized by Google

fense was duly taken, as set forth in this record. At the argument in the court below, however, it was contended by defendant that the device set forth and described in the letters patent did not, on the face thereof, show patentable invention, and this contention having been sustained, it was upon this ground that the decree dismissing the bill was entered.

Refrigerator buildings containing cold storage rooms on their several stories, are not very old in the refrigerating art. The use of elevators to carry commodities to the several floors, to be stored, caused an escape of cold air through the spaces in the elevator shaft surrounding the car, when the door communicating therewith was opened. It appears from the evidence and by the statements of the patent itself, that the device most frequently resorted to, to prevent, or at least diminish, the loss of cold air in this way, was to provide a small ante-room, into which the shaft of the elevator was introduced. This ante-room was refrigerated in the same way as the storage rooms, and whatever cold air escaped down the shaft, when the elevator door was opened, escaped from this ante-room. The goods, being held in the ante-room until the door communicating with the elevator shaft was closed, could then be moved into the storage room, through a door which until then had been kept closed. In this method, there was the obvious objection that the temperature of the ante-room was somewhat raised by each opening of the elevator door, so that when the door to the storage room was opened, its temperature was affected by the temperature of the ante-room. There was also, as stated in the specifications, the disadvantage of the warm air coming up the shaft condensing its moisture on the refrigerator pipes, and producing a damp and unwholesome atmosphere.

The claimed invention of the patent in suit is the making air tight the space between the car and the shaft in which it travels, thus permitting the elevator shaft to be introduced directly through the cold storage rooms on the several floors, the only effect in the temperature of which, would be that produced by the air confined in the small space of the car itself when the door was opened. This was undoubtedly an advantage in requiring but one handling of the goods to be stored, and the saving of space occupied by an ante-room. This has all been stated in the specifications, as follows:

"Heretofore in refrigerating plants and cold storage buildings it has been customary where elevators were employed to convey merchandise from one floor to another to provide a vestibule or anteroom between the elevator shaft and the cold rooms in order that the cold air in the latter compartment should not escape up or down the elevator shaft while the entrance thereto was open. This escape of the cold air was made possible because the cab did not fit the shaft and the shaft openings with sufficient closeness to prevent a free and extensive movement of air at and around its sides or edges and also because during the rush hours of business the doors between the rooms were often left open. To obviate these difficulties as much as possible, the anteroom was provided as a sort of air lock or buffer, and the space so employed was by reason of the shifting temperature rendered useless for storage and was consequently a loss of space. This room was also by reason of the differing temperatures wet and musty and always unsanitary. My present invention is designed to utilize this space and make it clean and wholesome and, in fact, to absorb the space in the general storage room and make the cab a traveling anteroom, and to this end I make the cab practically air-

Digitized by Google

tight, except the open face or faces or fronts, and provide flexible flaps, which bridge over and between the edges of the cab and the corresponding opening in the elevator shaft and provide a vestibule. The result will be that while the cab is discharging or taking on goods the air in the adjoining room cannot escape through or around it. The room and space heretofore rendered unavailable for storage purposes can thus be utilized. In the employment also of the old form of anteroom as an air-lock or buffer it implied and required a double handling of the goods. It constituted an intermediary room only. This room in connection with my invention I eliminate and dispense with and absorb into the general storage room. Air locks are established by merging the air in the elevator car and each floor when they are thrown together in my present invention, as will be explained."

There are six claims of the patent in suit, the first of which is as follows:

"(1) A refrigerator-building comprising two or more floors, an elevator shaft, means of access between the floors and said shaft, an elevator-car providing a traveling anteroom operating in said shaft, and means whereby an air-lock is established between said elevator-car and each floor when they are thrown together."

The other claims are more specific as to means for closing or bridging the space between the car and the sides of the elevator shaft. The question, however, as to patentability is applicable to them all. It was admitted by the counsel for the appellant, that there was no invention in the means employed to make the space between the elevator shaft and the car air-tight at the different floors. His contention, however, was that the invention lay in the conception or "happy thought" that an ante-room might be dispensed with, and the goods to be refrigerated directly introduced into the cold storage rooms, by simply making the shaft air-tight by any well-known device. This is a forceful, as well as an ingenious, way of stating appellant's case, and might as to some combinations of old elements be applicable and decisive. Here, however, it fails to convince us that patentable invention was involved in the combination of the patent in suit. The essential feature of the combination was making air-tight the shaft of the elevator around the car, so as to prevent the escape of cold air from the floor at which the car was being loaded or unloaded. When the difficulty to be overcome is so obvious a one, as the escape or entrance of air through the open spaces between the elevator car and the shaft through which it travels, into the rooms communicating therewith, it is hard to conceive what invention there can be in making air-tight those open spaces by bridging them with rubber flaps, or any of the other well-known devices for such purposes. It would seem that the conception or thought of doing so, was as obvious as the means employed. To put weather strips on a window or door, to prevent the ingress of cold air or the escape of warm air, does not involve invention, any more in the thought than in the means employed.

As pointed out by the learned judge of the court below, the fact that this combination dispensed with the use of the ante-room, and made necessary only one handling of the goods carried, though it may establish the utility essential to patentability, does not of itself prove invention. Neither is the argument for the patentability of the combination advanced by the constant iteration of the appellation "traveling

Digitized by Google

ante-room," as applied to the elevator car. It is still an elevator car, as it was before the spaces between it and the shaft were made air-tight. It performs the same function and has the same relation to the cold storage room that it had to the ante-room. It is the packing of the piston, the making air-tight of the shaft in the space around the car, that makes possible the introduction of the elevator directly into the cold storage room.

We have carefully considered the cases referred to by appellant's counsel, in which courts have refused to sustain demurrers to the patentability of the device on the face of the letters patent, and we have not been unmindful, in the consideration of this case, of the admonition so frequently made by courts, that patents should not be declared invalid, upon demurrer or otherwise, upon the face of the patent itself, unless the invalidity so clearly appears that no testimony can change the legal aspect of the case, and that if doubt exists, the complainant is entitled to its benefit. But in cases thus clear on the face of the patent itself, courts may, even where the question is not raised by the pleadings, sua sponte, declare the patent invalid and dismiss the bill. That the power and duty of the court may have this extent, is clearly held by the Supreme Court in Brown v. Piper, 91 U. S. 37, 43–44, 23 L. Ed. 200. Slawson v. Grand St. Ry. Co., 107 U. S. 649, 652, 2 Sup. Ct. 663, 27 L. Ed. 576.

In view of the clear and elaborate opinion of the learned judge of the court below ([C. C.] 147 Fed. 525), it is unnecessary to further extend the discussion of the single question involved in this case.

The decree below is therefore affirmed.

Digitized by Google

(153 Fed. 184.)

NATIONAL ENAMELING & STAMPING CO. et al. v. NEW ENGLAND ENAMELING CO.

(Circuit Court of Appeals, Second Circuit. March 1, 1907.)

No. 261.

PATENTS—VALIDITY AND INFRINGEMENT—ENAMELING METAL WARE.

The Claus patent, No. 527,361, for an improvement in enameling metal ware, *held* void as to claims 1, 2, and 3, and not infringed as to claims 9, 10, 11, and 12.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Arthur v. Briesen (Louis Marshall, of counsel), for appellants.

R. N. Kenyon, Wm. Houston Kenyon, and Steinhardt & Goldman (Walter F. Rogers, of counsel), for appellee.

Before WALLACE and COXE, Circuit Judges, and HOLT, District Judge.

HOLT, District Judge. This is an appeal by the complainants from a portion of a decree of the Circuit Court rendered in a suit brought to restrain the alleged infringement of United States patent 527,361 dated October 9, 1894, granted to Hubert Claus for an improvement in enameling metal ware. The patent contains 13 claims. The court below held that claims 1, 2, and 3 were invalid, that claims 4, 5, 6, 7, and 8 were valid and infringed, and that claims, 9, 10, 11, and 12 were not infringed. Claim 13 was not involved in the suit.

The defendant formerly appealed from that portion of the decree which held that claims 4, 5, 6, 7, and 8 were valid and infringed, and on a former hearing in this court that portion of the decree was reversed, and a final decree was entered dismissing the bill. 151 Fed. 19. From the portion of the decree below which dismisses the bill of complaint as to claims 1, 2, 3, 9, 10, 11, and 12 the complainant now appeals, and the question upon this appeal is whether the decision of the court below holding that claims 1, 2, and 3 were invalid, and claims 9, 10, 11, and 12 were not infringed, was erroneous in any respect. The decision of this court on the former appeal that claims 4, 5, 6, and 7 were invalid necessarily establishes that claims 1, 2, and 3 are invalid. Claims 4, 5, 6, and 7 are in substance the same as claims 1, 2, and 3, except that the latter claims are more detailed. The decision of the court that the later claims were invalid necessarily established that the broader and more general earlier claims are also invalid.

Claims 9, 10, 11, and 12 are process claims. Claim 9 reads as follows:

"The process of enameling which consists in coating an article with an alkaline enamel and in applying thereto while still moist a metallic salt or salts, substantially as described."

Claims 10, 11, and 12 are substantially the same, except that, instead of the general term "a metallic salt or salts," is substituted, in claim 10, "sulphate of iron and sulphate of copper," in claim 11 "sulphate of iron," and in claim 12 "sulphate of copper."

Digitized by Google

The process particularly described in the specification for the application of the metallic salts to the enamel is as follows:

"The surface to be coated is cleaned and the alkaline enamel applied in a thin layer in any suitable manner. The metallic salts are now applied to the enamel coating by dusting or by sprinkling or the salts may be mixed with the enamel before it is applied to the surface to be coated."

It is apparent, however, from the entire patent that Claus preferred the process of applying the metallic salts by dusting or sprinkling them on the moist coat on the article after it was dipped, rather than by mixing it with the enamel before it is applied to the surface to be coated. The only claim in his German patent is for the process of applying the metallic salts by dusting or sprinkling. The court below held, in substance, that the defendants had never applied metallic salts by dusting or sprinkling, and that, if that was to be regarded as the invention, the defendants had never infringed. It also held that, if the claims were to be construed broadly enough to include the mixing of the metallic salts with the enamel before its application to the article to be enameled, the process was not novel.

We entirely concur in these views of the court below. The method of obtaining mottles in enameling ware by mixing metallic oxides in the dip was old, and well known in the art. It was described in the Quimby and Whiting patent, and in the Niedringhaus patent. The fact that Claus in his tenth, eleventh, and twelfth claims specifies sulphate of iron and sulphate of copper, or one of them, as the metallic salts to be used, shows no invention. If a metallic salt of any kind was previously used, the substitution of another metallic salt which produced the same result would be the employment merely of an equivalent. If the claim, however, should be confined to the process of applying the salts by dusting and sprinkling upon the surface after the dip had been applied to the surface while still moist, even if such a method of applying the salts as distinct from the method of mixing them in the dip constituted an invention, it is enough to say, as was said by the court below, that the evidence establishes that the defendants have never used that process, and therefore have not infringed.

Our conclusion is that the portions of the decree appealed from in this appeal should be affirmed, with costs.

(150 Fed. 48.)

MARTHINSON v. KING et al.

(Circuit Court of Appeals, Fifth Circuit. November 8, 1906.)

No. 1,542.

1. SPECIFIC PERFORMANCE—OPTIONS.

Where an owner of property gives another a written option for a valuable consideration, agreeing to sell it to him at a fixed price if accepted within a specified time, such option is binding on the owner and on a purchaser from him, with knowledge thereof, and in a proper case may be specifically enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 51–53, 178.]

Digitized by Google

2. PROPERTY—STANDING TREES.

Trees growing on land constitute a part of the realty as provided by Ga. Code 1895, § 3045.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Property, § 4.]

3. SPECIFIC PERFORMANCE—ADEQUATE REMEDY AT LAW.

Complainant procured an option from defendant K. in consideration of $1,000, to purchase a cross-tie camp and outfit, together with certain growing timber, for $6,923.57, whereupon complainant gave a similar option to defendant lumber company to purchase the same outfit for $14,295. Defendant K. thereafter refused to perform his option to plaintiff, but sold the outfit direct to the lumber company, by which plaintiff alleged that he lost a net profit of $6,371.43. *Held*, that in the absence of any allegation that either K. or the lumber company were insolvent, complainant had an adequate remedy at law, and was not entitled to compel specific performance of his option.[1]

4. SAME—DISCRETION.

The granting of specific performance is not a matter of arbitrary discretion, but of judicial discretion controlled by principles of equity exercised on consideration of all the circumstances of the particular case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 17, 18.]

5. EQUITY—JURISDICTION—ALLEGATIONS.

Equity jurisdiction cannot be invoked by mere charges of fraud, conspiracy, prayers for injunction, and the cancellation of deeds as a cloud on title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 323–330.]

6. SAME.

The defense of adequate remedy at law is one of substance in the national courts affecting the jurisdiction, and may, therefore, be raised at any stage of the proceedings, either by the parties, or the court of its own volition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 173–176.]

7. COSTS—IN EQUITABLE CASES—DIVISION.

Where, in a suit for specific performance in a federal court, defendant raised the question of adequate remedy at law by answer, but did not call the court's attention thereto until final hearing on the merits, after large costs had been incurred in the taking of testimony, the court on sustaining such defense should have directed that a part of the costs should be taxed to defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 262.]

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

T. P. Ravenel, W. G. Charlton, and Livingston Kenan, for appellant.
Samuel B. Adams, for appellee N. B. King.

Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

SHELBY, Circuit Judge. The main purpose of the bill in this case is to enforce the specific performance of a contract. The suit is brought by Charles Marthinson, an alien and a subject of the King of Denmark, against N. B. King, a citizen of Georgia, and the Hall

[1] See note on page 368.

Digitized by Google

Tie & Lumber Company, a Virginia corporation. On the 16th day of July, 1903, two contracts were made. To understand this controversy it is necessary to state the substance and purpose of both of them. The first contract is between Charles Marthinson, the plaintiff, and N. B. King, one of the defendants. By its terms, in consideration of $1,000 which Marthinson paid to King, and the further sum of $6,-923.57, to be paid on August 1st following, King sells, or agrees to sell, to Marthinson a cross-tie camp and outfit, all the growing timber on certain described lots, 12 buildings, 4 mules, a certain mortgage against J. M. Revels, and other property specifically described in the contract. It is provided that King was to execute no transfer of the property until all of the purchase money was paid in full, and that in case of default of payment of all the purchase money King was to retain the property and also the money paid to him in advance. Such is the substance of the contract sought to be enforced in this suit.

On the same day, July 16, 1903, the other contract was made between Charles Marthinson, the plaintiff, and the other defendant, the Hall Tie & Lumber Company. This contract recites that Marthinson had previously given the company an option to purchase the outfit and property described in the foregoing contract of sale between King and Marthinson, and that such option had been extended in consideration of $200. In consideration of $1,000 paid by the company to Marthinson, the latter agreed to extend this option to August 1, 1903. The company was to pay Marthinson in all $14,295 for the property described in the first contract. Both contracts are in writing, and each is attested by two witnesses. For convenience of reference, they are copied in a footnote. It appears from the two contracts that, if both had been carried out according to their terms, Marthinson would have made a profit of $6,371.43 on the transaction. The bill alleges the execution of both contracts, and that all the parties to the suit had actual notice of both; that on the 1st day of August, 1903, the plaintiff and an agent of the company met in the city of Savannah for the purpose of closing these trades; and that the plaintiff was then ready and willing and able to pay N. B. King the balance of the purchase money agreed to be paid, but that King failed to be present and refused to carry out his contract. It is also alleged that a representative of the company was then present, willing and ready to pay the plaintiff $14,295 for the property, according to the agreement, and that the failure and bad faith of King "has resulted in great loss and damage to your orator; for by and under the terms of his purchase from King and sale to said Hall Tie & Lumber Company your orator would have realized a net profit of $6,371.43." It was then alleged that King, having failed to carry out his contract with the plaintiff, conveyed the property directly to the Hall Tie & Lumber Company, and that such conveyance was made "in order to defeat and defraud your orator out of all of the aforesaid property to which he was and is justly entitled under said contracts with said King, and out of the profits which he would realize out of the said trades touching said property, and in order to themselves profit by their said fraud," etc.; and it is alleged that all this is "contrary to equity and good conscience, and works a manifest wrong, injury, and irreparable loss to

Digitized by Google

your orator in the premises." In the eighth paragraph of the bill it is alleged that the plaintiff is remediless by the strict rules of the common law, and is only relievable in a court of equity. The plaintiff makes a tender to King of the balance of the purchase money, which tender is to continue during the pendency of the suit. The bill contains a prayer that the court should require King to execute and deliver to the plaintiff a good and sufficient title to the property, and that the transfer or pretended transfer between King and the Hall Tie & Lumber Company should be canceled. There is also a prayer that the defendants be enjoined from selling or disposing of any of the property and from cutting or removing the timber from the premises. The bill contains no averments as to the insolvency of either of the defendants.

The defendants filed a joint answer to all the paragraphs of the bill. In answer to the eighth paragraph they averred that each of them is solvent and amply responsive in damages; that each of them owns property in the state of Georgia more than sufficient to pay the sum claimed by the plaintiff; that the defendant company has large interests in the state of Virginia, North Carolina, and other states, and in this connection they expressly deny plaintiff's allegation as to his damage being irreparable. On the contrary, they aver that:

> "His remedy is ample at common law, and that they have abundant property to meet any judgment that he may recover against them, or either of them."

The case was tried on the merits, much evidence being taken and offered on both sides, and the court rendered a final decree dismissing the bill and remitting the plaintiff to his remedy at law. The plaintiff has appealed to this court, and assigns that the court below erred in dismissing the bill.

1. Whenever a contract is of such a form and nature that it has mutually executory promises, or whenever it is intended that it should require future acts or omissions from each of the parties, and that each should be bound to perform his stipulated part, there must be both mutuality of obligation and of remedy. It follows that, as a general rule governing cases for specific performance, the contract must be mutual, and either party is entitled to the equitable remedy of a specific performance. But when the contract is unilateral, and by its express terms is binding upon one of the parties only, it may, of course, be specifically enforced against that party, although the remedy cannot be granted to him against the other. Pomeroy on Specific Performance of Contracts, § 169. It is now well settled that if an owner of property gives another a written option on it for a valuable consideration, agreeing to sell it to him at a fixed price, if accepted within a specified time, it is binding upon the owner, and it is equally binding upon those who purchase from the owner with a knowledge of such agreement. In a proper case the courts will not hesitate to enforce an option as readily as they enforce other contracts. Johnston v. Trippe (C. C.) 33 Fed. 530; Black v. Maddox, 104 Ga. 157, 30 S. E. 723; Ross v. Parks, 93 Ala. 153, 8 South. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47. Conceding, therefore, that the contract between

Digitized by Google

the appellant and King was an option, that fact would not prevent its specific enforcement.

2. Part of the property involved here is personal property, and part is classed as real estate. Trees growing on land constitute part of the realty. Douglass v. Bunn, 110 Ga. 159–162, 35 S. E. 339; Ga. Code 1895, § 3045. It is true that the courts will sometimes specifically enforce a contract concerning land when it would refuse to enforce one in the same terms relating to personal property. In a contract for the purchase of merchandise, where there is nothing to impress a peculiar value upon the identical articles, the purchaser can go into the market and buy other articles of the same kind with the damages he may recover at law, and so his loss would be fully compensated. But a landed estate, though of precisely the same value as another, may be entirely different in other circumstances that make it an object of desire to the purchaser. It has, therefore, become a rule governing ordinary contracts relating to landed estates, when such contracts contain none of the circumstances which appeal to the discretion of the court, that it is as much a matter of course for a court of equity to enforce them as it is for a court of law to give damages for the breach of them. It should be borne in mind, however, that no distinction inheres in the nature of land and chattels, and that the fundamental principles which control the action of the court are the same whether the contract relates to realty or personalty; for we find that where chattels have some peculiar value to their owner over and above any market value which could be placed on them in accordance with strict legal rules—such as an heirloom, a painting, or other work of art—contracts concerning them will be specifically enforced in equity. Although the trees described in the contract considered here are a part of the realty, they having been purchased with a view to their severance and sale, the contract cannot be looked on as embracing a landed estate that makes it an object of desire to the purchaser, giving it a value not to be estimated in damages.

In Paddock v. Davenport, 107 N. C. 710, 12 S. E. 464, it was held that where trees are bought with a view to their severance from the soil, thus being converted into personalty, and there are no circumstances from which it can be inferred that breach of the contract may not be readily compensated for in damages, specific performance will not lie. Certainly this doctrine should apply where the contract sought to be enforced, together with the pleadings of the plaintiff, show that he himself has put an exact estimate upon the amount of damage he has suffered by the breach of the contract. When we remember that a court of equity will enforce a contract relating to a work of art on the same principles that it will enforce one relating to a landed estate, the case of Dowling v. Bitjemann, 2 John. & H. 544, s. c. 8 Jur. (N. S.) 538, becomes worthy of attention here. This was a suit by an artist seeking to obtain possession of a picture. It was conceded that a court of equity had undisputed jurisdiction to order the delivery of a painting when it has a special value, and that the legal remedy is therefore inadequate; but, as his agreement and his pleadings showed that the artist had himself put a fixed price on the picture, it was held that damages would, under these circumstances, be an adequate reme-

Digitized by Google

dy, and that there was no necessity for interference by an equity tribunal. This case is quoted by Pomeroy, and the proposition of his own text amounts to this: That a party by his own acts may put a certain value on a unique chattel which can be recovered at law, and which, being his own estimate, will be taken as sufficient compensation. Pomeroy on Specific Performance of Contracts, p. 17, note 2.

We can see no reason why this principle is not equally applicable to a case where the plaintiff puts a certain value on chattels and trees to be severed by estimating to a cent the amount he has lost by the failure of the defendant to transfer them to him.

3. The granting of the equitable remedy of specific performance is a matter of discretion—not of an arbitrary discretion synonymous with the mere pleasure of a judge, but of a judicial discretion controlled by principles of equity exercised upon consideration of all the circumstances of the particular case. In determining a particular case, the question of granting a specific performance often turns upon collateral incidents connected with and shedding light on the contract sought to be enforced. Both the contracts to which this suit relates are made parts of the bill. They really constitute a single transaction; both being necessary to show the nature and extent of the plaintiff's loss. The company held an option on the property comprising the subject of the suit, which had been once extended. It desired to obtain another extension. The three parties, the plaintiff and the two defendants, with the knowledge of all, on the same day made the two contracts. King, who had the title to the property, sold, or agreed to sell, it to Marthinson, the plaintiff, for $1,000 cash, the remainder of the price to be paid later. King was to hold the title till all the price was paid. Marthinson, at the same time, extended the company's option, and sold, or agreed to sell, the property at a larger price to the company, receiving $1,000 in cash (which presumably he used in paying King), the remainder of the purchase money to be paid at a later date. By the contracts King was to convey to Marthinson and Marthinson was to convey to the company. The result of the performance of both agreements would have been that the company would have had the title to the property and Marthinson would have made the difference between what he paid King and the larger price he received from the company. Marthinson was a middleman, to receive and pass the title on to the company. His true relation to the sale was similar to that of a broker representing the vendor and vendee. The difference in the buying and the selling price was his pay. Instead of doing as he agreed, King ignored the plaintiff and conveyed direct to the company. He put the title, however, where the agreements provided it should go. Assuming the averments of the bill to be true, he conspired with the other defendant, violated his obligation, and cheated the plaintiff out of the profits to which he was entitled, which is a sum certain—the difference between plaintiff's buying price and his selling price. All this had occurred before the bill was filed. The plaintiff, by the terms of the two contracts, acquired no right to hold the title to the property permanently. He was to take it and pass it on to the company. He was not, therefore, when the bill was filed, entitled to have the title vested in him, to remain

Digitized by Google

in him. What he really was entitled to was the amount of his damages—his lost profits—taking the averments of the bill as true. Both defendants being solvent, his remedy at law was ample and adequate when the bill was filed. It is true, as argued by the appellant, that in a suit which properly invokes equitable jurisdiction the court will go on and do complete justice, though in its progress it may decree on a matter which was cognizable at law. Cathcart v. Robinson, 5 Pet. 264, 8 L. Ed. 120. Under this rule, if the bill had made a case of which a court of equity had jurisdiction and in which the plaintiff would have been entitled to relief, and some subsequent event had made it impossible for him to have obtained relief by specific performance, the case might have been retained to assess damages. But the appellant's claim for a decree for damages cannot be sustained in this case because the bill does not show a case for specific performance or for any equitable relief. Section 723, Rev. St. U. S. [U. S. Comp. St. 1901, p. 583], provides that:

> "Suits in equity shall not be sustained in either of the courts of the United States where a plain, adequate and complete remedy may be had at law."

As Judge Pardee observed in Zeringue v. Texas & P. R. Co. (C. C.) 34 Fed. 239, 243:

> "Under no head of chancery jurisdiction can a court of the United States sustain a bill in equity to obtain only a decree for the payment of money by way of damages when the like amount can be recovered at law."

4. As to other averments which it is claimed confer jurisdiction in equity, it is only necessary to say that charges of fraud and conspiracy and prayers for injunctions and the cancellation of deeds as a cloud on title do not confer jurisdiction in equity, when the bill, taken as a whole, shows that the remedy at law is complete and adequate. If it were otherwise, a defendant could be deprived, by a mere form of pleading, of the constitutional right to a trial by jury which he has in "all suits at common law where the value in controversy shall exceed twenty dollars."

5. It is often said that, unless the objection that the plaintiff has a perfect remedy at law is raised as a preliminary question, it will be regarded as waived. But the defense of good remedy at law is one of substance in the national courts, and one affecting the jurisdiction of the court in equity, and it may, therefore, be raised at any stage of the proceedings, or, in a case like this, the court may raise it of its own volition. In this case, the defect appearing on the face of the bill, the objection should have been raised by demurrer. One of the purposes of raising such question by demurrer is "to prevent an unnecessary expense." Story's Equity Pleadings, § 447. The defendants raised the question by answer, and the attention of the court was not called to it, so far as appears from the orders and decrees, till the final hearing on the merits. Before the court came to pass on the question a mass of testimony had been taken on the merits, involving large costs. If the defendants had raised the question by demurrer, this expense would have been avoided, for the court would have held, as the learned judge did hold when the case was heard, that the remedy at law was adequate.

Digitized by Google

Under these circumstances, we think that the defendants should be taxed with the part of the costs incurred by them in the Circuit Court, and the decree will be amended to that effect. The appellant will pay the costs of the appeal. The decree of the Circuit Court, as amended, is affirmed.

NOTE.

"Savannah, Ga., July 16, 1903.

"For and in consideration of the sum of one thousand dollars ($1000.00) to me in hand paid by Charles Marthinson, at and before signing hereof, the receipt whereof I hereby acknowledge, and for the other consideration hereinafter stated, I hereby sell to said Charles Marthinson the following property, consisting of my crosstie camp and outfit, located in 2nd land district of Charlton County, Georgia, and itemized as follows: All timber on lots numbers seventy-one, one hundred and twenty-one, one hundred and twenty-two, one hundred and twenty-three, one hundred and thirty-three, one hundred and thirty-four and one hundred and thirty-five, with lease of five years from January 1st, 1903, to cut and remove said timber; twelve buildings, four mules, three wagons and harness, my lease of siding, stock of goods in commissary, loading ropes, saddle and bridle, extra collar, twenty sacks of corn, ten sacks of oats, twelve bales of hay, horse, buggy and harness.

"The price for entire outfit to be seven thousand six hundred and three dollars and fifty-seven cents ($7603.57), payable as follows: One thousand dollars ($1000) in cash now, as above receipted for, and balance in cash on or before August 1st, 1903.

"It being understood that unless the said Charles Marthinson shall pay to me on or before the 1st of August, next, the sum of six thousand six hundred and three dollars and fifty seven cents ($6603.57), which is balance due on this purchase, then the sum of one thousand dollars now paid to me shall be forfeited and retained by me without any accounting. In other words, I am not to make or execute the papers transferring said property until all of purchase money is paid in full, and in case of default of payment I am to retain all of said property and also the money now paid to me as above receipted, and this agreement becomes null and void.

"It is also agreed and understood between said Charles Marthinson and myself that when final settlement is made and papers executed, the said Charles Marthinson shall, in addition to above purchase pay to me the sum of three hundred and twenty dollars ($320.00) for which I will transfer to him a mortgage which I hold against J. M. Revels, for three mules and one timber cart and fixtures, together with said Revels' obligation to work out the mortgage debt on same—as verbally understood between said Revels and myself.

"[Signed] N. B. King.

"Witness:

"W. G. Guyton.

"Richard Burry."

"Savannah, Ga., July 16, 1903.

"Whereas I gave to Hall Tie & Lumber Company under date of July 7, 1903, an option to purchase the crosstie camp and complete outfit thereto belonging in second land district of Charlton County, Georgia, consisting of lots numbers 71, 122, 123, 133, 134 and 135, together with buildings and tents thereon, siding of railroad, all goods in commissary, four mules, three wagons with harness, with lease to cut and remove said timber any time within five years from January 1, 1903, for the sum of thirteen thousand dollars, payable as set forth in said option and which option was extended to July 20th in a second instrument of writing signed by me, and whereas for above stated option and extension the said Hall Tie & Lumber Company have heretofore paid me the sum of two hundred dollars ($200). Now, therefore, for and in consideration of the sum of one thousand dollars ($1000.00)—more to me in hand paid by said Hall Tie & Lumber Company, at and before signing hereof, the receipt whereof is hereby acknowledged, I hereby agree to extend said option to 1st of August, 1903, and to modify payments as follows: On or before 1st August, 1903, Hall Tie & Lumber Company shall pay to me in cash,

Digitized by Google

the sum of fifty-three hundred dollars ($5300.00) in addition to amounts already paid on options; and shall execute and deliver to me their notes as follows: One thousand five hundred dollars ($1500) payable in sixty days from date of deed transferring property to them, and the balance of purchase money, same being five thousand dollars ($5000) divided into eight equal parts, payable respectively in three, four, five, six, seven, eight, nine, and ten months from date of said deed. All deferred payments bearing interest at six per cent. per annum and secured by the property, that is to say, I do not release my ownership until all notes are paid.

"And in addition thereto the said company shall purchase and pay in cash, within time named above, for following items, viz.:

"One horse and buggy with harness	$250 00
750 cross-ties in woods last Saturday	97 50
Rope for loading logs, saddle and bridle, 30 sacks feed and ——— bales of hay	60 00
Accounts of 75 men now working	887 50

"Upon settlement as above stated I agree to furnish full * * * clear of all encumbrances, proper documents transferring above property to said Hall Tie & Lumber Company. But it is understood and agreed that in the event of failure of said Hall Tie & Lumber Company to meet the settlements and payments as above set forth on or before the 1st of August, 1903, then all money paid me on options, including the one thousand dollars ($1000) now paid, shall be forfeited by them and retained by me, and this agreement becomes null and void.

"[Signed] Chas. Marthinson.

"Witness:

"W. G. Guyton,

"Richard Burry."

NOTE.

Right to Specific Performance as Affected by Adequacy of Remedy at Law.

I. In General.

[a] Specific performance will not be decreed where adequate compensation can be had at law.

—(U. S. 1834) Roundtree v. McLain, Fed. Cas. No. 12,084a [Hemp. 245];
(La. 1897) Caperton v. Forrey, 49 La. Ann. 872, 21 South. 600;
(Minn. 1861) McClane v. White, 5 Minn. 178 (Gil. 139);
(N. Y. 1850) Phillips v. Berger, 8 Barb. 527, affirming (1848) 2 Barb. 608;
(1865) Pennsylvania Coal Co. v. Delaware & H. Canal Co., 31 N. Y. 91;
(N. C. 1855) Lloyd v. Wheatly, 55 N. C. 267;
(Pa. 1882) Smaltz's Appeal, 99 Pa. 310.

[b] A decree for specific performance will never be granted, where the party has a complete remedy at law.

—(Md. 1853) Wadsworth v. Manning, 4 Md. 59;
(N. J. 1896) Young Lock Nut Co. v. Brownley Mfg. Co. (Ch.) 34 Atl. 947.

[c] (U. S. 1892) Where a telegraph company by a written contract authorizes complainants to put up a wire between New York and Philadelphia on the company's poles, on condition that at the end of a certain time the wire should belong to the company, who would lease it to complainants at a yearly rental of $600, repeated actions at law for damages would not be an adequate remedy for the refusal of the company to carry out the contract, and the only effective relief is a decree in equity defining the rights and liabilities of the parties, and compelling their observance.—Franklin Tel. Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776.

[d] (U. S. 1897) Where a city council, with full knowledge that two applicants for a street-railway franchise have contracted to unite their interests, nevertheless grants the franchise to one of the parties exclusively, who thereupon forms a corporation, a court of equity will not specifically enforce the

Digitized by Google

contract by requiring a transfer of an interest in the franchise or the stock of the corporation, but will remit the other party to his action at law for damages for breach of the contract. 80 Fed. 839, 26 C. C. A. 175, modified.—Hyer v. Richmond Traction Co., 168 U. S. 471, 18 Sup. Ct. 114, 42 L. Ed. 547.

[e] (U. S. 1899) A waterworks company, to which a town has issued its warrants in due form, and signed by its proper officers, in payment of water rentals accruing under a contract between the town and company, on the refusal of the town to pay the warrants at maturity on the ground of their illegality cannot maintain a suit in equity to enforce a specific performance of the rental contract, its remedy being upon the warrants, which are legal demands, and, if valid, enforceable in a court of law. Decree (N. M. 1897) 49 Pac. 898, reversed.—Raton Waterworks Co. v. Town of Raton, 174 U. S. 360, 19 Sup. Ct. 719, 43 L. Ed. 1005.

[f] (U. S. 1904) An action for damages for breach of a stipulation, that an action which has passed to judgment shall abide the final decision of another action, is not as efficient as a suit in equity for specific performance, where the final decision of the other action requires a reversal of the judgment. Decree (C. C.) 127 Fed. 387, reversed.—Brown v. Arnold, 131 Fed. 723, 67 C. C. A. 125.

[g] (Cal. 1855) A contract should be enforced in every case where the subject of it is something susceptible of substantial enjoyment, provided, always, that the circumstances surrounding and connected with the contract bring it within the equitable rules which entitle it to the relief sought, and where the remedy at law is uncertain and insufficient.—Johnson v. Rickett, 5 Cal. 218.

[h] (Cal. 1905) An agreement by a mortgagor not to assert a fixed monetary demand against the mortgagee's claim on foreclosure, and not to plead limitations as against another specific part of the mortgagee's claim, in consideration of an agreement by the mortgagee to devise the mortgaged property to the mortgagor, cannot be specifically enforced against the executors and heirs or devisees of the mortgagee, as the mortgagor's remedy at law by an action for damages is adequate and complete.—Flood v. Templeton, 148 Cal. 374, 83 Pac. 148.

[i] (Ill. 1901) Prior to the construction of the Chicago drainage ditch, the city had emptied its sewage into the Chicago river, from which part of the water supply of the Illinois & Michigan Canal, belonging to and operated by the state of Illinois, was obtained. To prevent the sewage flowing into Lake Michigan, water was pumped, at the expense of both the city and the state, from the river into the canal, which also became necessary to maintain a navigable stage of water in the canal. When the drainage ditch was constructed, it was found that its operation would draw the water from the lake past the inlet into the river, and thus further lower the water in the canal, whereupon the attorney general filed suit against the sanitary district to restrain it from lowering the level of the river. Suit was also threatened by St. Louis to enjoin the opening of the ditch, and the governor refused permission to open the ditch unless the sanitary district would preserve navigation on the canal, whereupon the district contracted to pump sufficient water into the canal to perpetually maintain a navigable depth. If the drainage ditch had not been constructed at all, the water in the canal would not support navigation if the water in the river were on a level with the lake, which had greatly receded since the canal was built. The sanitary district subsequently refused performance of the contract. *Held*, that if within their corporate power, being executed under the circumstances which it was, it was not such as equity would specifically enforce, but the state's remedy, if any, was at law for damages.—Canal Com'rs v. Sanitary Dist. of Chicago, 191 Ill. 326, 61 N. E. 71.

[j] (Iowa, 1902) An action for the specific performance of an antenuptial contract, in which the husband promised to convey to his wife all his money and property, will not lie, though it is alleged that defendants other than the husband are in possession of the money, as there is an adequate remedy at law.—Hull v. Hull, 117 Iowa, 63, 90 N. W. 496.

[k] (La. 1892) Under Rev. Civ. Code, art. 1926, declaring that, on the breach of any obligation, the obligee is entitled either to damages, or, in cases which

Digitized by Google

permit it, to a specific performance of the contract, at his option, and article 1927, declaring that in ordinary cases the breach of a contract entitles the party aggrieved only to damages, but, where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance, by means prescribed in the laws which regulate the practice of courts, specific performance will not be granted, where plaintiff can be adequately compensated in a suit for damages.—City of New Orleans v. New Orleans & N. E. R. Co., 44 La. Ann. 64, 10 South. 401.

[l] (Minn. 1884) Defendant deposited stone, earth, and débris in the Mississippi river opposite abutting land of plaintiff, and between such land and the center of the river, with plaintiff's consent thereto, given upon defendant's agreement to remove the same by a specified time. *Held*, that specific performance of such agreement by defendant could not be enforced, plaintiff having an adequate remedy by an action for damages for breach of the contract.—Minneapolis Mill Co. v. Bassett, 31 Minn. 390, 18 N. W. 100.

[m] (N. H. 1886) Equity enforces specific performance of a contract, not on the ground of mutuality of remedy, but on the ground that the plaintiff has no adequate remedy at law. Whether he has such remedy is determined by the court as a fact.—Eckstein v. Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404.

[n] (N. J. 1901) Specific performance of a contract to take down or remove a building cannot be decreed on allegation that damages at law were inadequate because defendant contemplated the sale of the building to a rival concern, and plaintiff desired its destruction, as the building was valuable as a part of the good will of plaintiff's business, where there was no restriction in the contract as to the use of the building.—Armour v. Connolly, 49 Atl. 1117.

[o] (N. Y. 1865) When the plaintiff's rights cannot be protected or enforced at law, except by numerous and expensive suits, equity may interpose to give the party redress by injunction or specific performance; but in such cases, generally, the plaintiff must first establish his right at law before a court of equity will interfere.—Pennsylvania Coal Co. v. Delaware & H. Canal Co., 31 N. Y. 91.

[p] (N. Y. 1889) Where a written contract is entered into to discontinue an action in the marine court, and to vacate a judgment entered therein, in favor of a defendant, and such contract is lost, there is no adequate remedy at law for a violation of such contract, and an action may be maintained for the restoration of such contract and specific performance.—Deen v. Milne, 113 N. Y. 303, 20 N. E. 861; Id., 21 N. E. 1116.

[q] (Pa. 1877) The act of June 16, 1836, in granting equity powers to the courts of common pleas, limits the jurisdiction in the case of specific performance of contracts to cases where there is no adequate relief at law.—Nestel v. Insurance Co., 34 Leg. Int. 240.

[r] (Pa. 1881) A canal company, whose charter (enacted prior to the constitution of 1838) empowered it to take the water of a creek and required it to make compensation therefor, without making the paying or securing of such compensation a condition precedent, as required by the constitution of 1838, cannot be enjoined from continuing to use the water under the power, notwithstanding that damages have been assessed against it, which, on account of its insolvency, it has been wholly unable to pay. *Held*, that as a stockholder, aggrieved by the breach of such contract, had an adequate remedy at law by debt or assumpsit, he could not invoke the aid of equity to enforce specific performance thereof.—Appeal of Zoological Society, 38 Leg. Int. 403.

[s] (Pa. 1897) Equity cannot be invoked to compel specific performance of a contract to "complete" certain houses, as plaintiff has an adequate remedy at law in that he may complete the houses, and sue defendant, whose responsibility is not questioned, upon its promise to pay for the work.—Dove v. Commonwealth Title Ins. & Trust Co. (Com. Pl.) 6 Pa. Dist. R. 263.

[t] (Pa. 1900) The remedy at law for refusal to complete purchase of a license and the lease and fixtures of a barroom is adequate.—Meehan v. Owens, 196 Pa. 69, 46 Atl. 263.

[u] (Pa. 1903) A bill for specific performance will not be dismissed merely because complainant has a remedy at law, unless it is shown that his remedy is adequate.—Gray v. Citizens' Gas Co., 206 Pa. 303, 55 Atl. 988.

Digitized by Google

[v] (Tex. 1905) Where specific performance of a contract with a railroad company for the transportation of freight for a term of years will enable the company to earn operating expenses, and, without the revenue secured by such performance, it will be financially embarrassed, specific performance cannot be refused because the company has an adequate remedy at law, as the right to sue for damages for breach of the contract would not be an efficient remedy.—Lone Star Salt Co. v. Texas Short Line Ry. Co., 86 S. W. 355.

[w] (Va. 1903) A lessee of an office, under a verbal contract for a term of five years, in part performance of his contract with the lessor, made valuable improvements in the office, but did nothing the value of which could not readily be measured in money. *Held*, that equity would not decree specific performance of the contract, the proper remedy being an action for damages in case of breach.—Henley v. Cottrell Real Estate, Ins. & Loan Co., 101 Va. 70, 43 S. E. 191.

[x] (Wash. 1894) Specific performance being bottomed on inadequacy of the remedy at law, the fact that a particular case belongs to a class of cases in which specific performance is granted is conclusive that the remedy by damages is inadequate.—Payne v. Still, 10 Wash. 433, 38 Pac. 994.

II. Validity and Equitableness of Contract.

[a] (U. S. 1906) The specific performance of a contract is not a matter of absolute right, but rests in the judicial discretion of the court, to be exercised in accordance with the principles of equity, and a specific performance will not be decreed where it would be inequitable.—Jones v. Byrne (C. C.) 149 Fed. 457.

[b] (Iowa, 1906) The remedy of specific performance rests in the judicial discretion of the chancellor, and will not be granted save on a contract based on a valuable consideration and in a case where compensation in damages will not afford adequate relief.—Robinson v. Luther, 109 N. W. 775.

[c] (Pa. 1906) A court of equity will not enforce the specific performance of a contract to purchase a judgment, where it appears that the defendant in the bill agreed to pay $900 for a judgment from which there was no reasonable hope of realizing $1. In such a case the plaintiff will be left to his remedy at law.—Spotts v. Eisenhauer, 31 Pa. Super. Ct. 89.

III. Adequacy of Defense to Other Action.

[a] (Mass. 1901) An administrator may maintain a bill in equity for specific performance of an executory agreement made with him by a creditor of the decedent to accept a sum of money in compromise of actions at law against the estate, the administrator having no adequate remedy at law, because such agreement, though approved by the probate court, is not a valid legal defense to such actions.—Cook v. Richardson, 178 Mass. 125, 59 N. E. 675.

[b] (Mass. 1904) Where a husband was entitled to avail himself of a contract for separate maintenance of his wife as an equitable defense to her suit for support in the probate court, the trustee through whom such agreement was made was not entitled to maintain a bill in equity to restrain the wife's proceeding, and to specifically enforce such agreement.—Bailey v. Dillon, 186 Mass. 244, 71 N. E. 538, 66 L. R. A. 427.

[c] (Mo. 1902) The maker of a note is not entitled to equitable intervention to compel the holder to credit on the note payments made thereon, the maker having an adequate remedy at law by plea of his payments when sued on the note, since there is no statute of limitation that would bar the payment that would not at the same time bar the note.—Reed v. Reed, 94 Mo. App. 590, 68 S. W. 385.

IV. Solvency or Insolvency of Defendant.

[a] (N. Y. 1905) In a suit for specific performance it is no defense that defendant is responsible and that plaintiff has an adequate remedy at law.—Jones v. Barnes, 105 App. Div. 287, 94 N. Y. Supp. 695.

[b] (Or. 1904) A complaint sought specific performance of an alleged agreement by beneficiaries named in a benefit certificate to surrender the same to plaintiff on payment by him of the dues and assessments which they had paid under an agreement by them with the assured, plaintiff having fulfilled, as he

Digitized by Google

claimed, the other conditions of his agreement in providing a home for assured and paying the dues and assessments since forming the compact, and at the same time to prevent the beneficial association from paying the fund to the beneficiaries, and to require payment to plaintiff. *Held*, that the remedy in equity adopted by plaintiff alone adequately afforded the relief sought, as a judgment in an action at law against the beneficiaries might prove unavailing if they were found insolvent.—Brett v. Warnick, 44 Or. 511, 75 Pac. 1061, 102 Am. St. Rep. 639.

[c] (Or. 1904) Insolvency of defendant is not, alone, ground for specific performance of a contract.—Livesley v. Johnston, 45 Or. 30, 76 Pac. 946, 65 L. R. A. 783, 106 Am. St. Rep. 647; Same v. Heise, 76 Pac. 1134.

V. Bills Seeking Only Compensation or Damages.

[a] (D. C. 1889) A bill in equity will not lie on a mere claim of damages for failure to specifically perform a contract.—Townsend v. Vanderwerker, 20 D. C. 197.

[b] (Ill. 1874) Specific performance of mere personal contracts for payment of money is not awarded, for the legal remedy is adequate.—Pierce v. Plumb, 74 Ill. 326.

[c] (Iowa, 1872) Specific performance will not be decreed, unless something more is to be effected thereby than the mere payment of money. It must appear that an award of damages would fail to compensate the plaintiff.—Richmond v. Dubuque & S. C. R. Co., 33 Iowa, 422.

[d] (Miss. 1866) Equity does not entertain jurisdiction to give redress by way of compensation or damages, except when such relief is incidental to that sought by the bill and granted by the court, or where there is no adequate remedy at law, or where some peculiar equity intervenes.—Scott v. Billgerry, 40 Miss. 119.

[e] (Mo. 1900) Where a petition simply seeks a recovery for the value of services rendered, board and lodging furnished, and improvements made at the request of defendant, and asks for a moneyed judgment, it sets forth a cause of action at law, and one which was properly triable before a jury, and hence is not maintainable as an equitable action for specific performance.—Whittaker v. Summerville, 83 Mo. App. 553.

[f] (N. J. 1839) Equity will entertain a bill by a lessee for specific performance of an agreement in the lease that the improvements made upon the premises by the lessee should, after the expiration of the term, remain the property of the lessor, on his making fair compensation therefor to the lessee, though the bill be purely for compensation and damages, provided specific performance may be decreed, and the complainant can have adequate relief only in equity.—Berry v. Van Winkle's Ex'rs, 2 N. J. Eq. (1 H. W. Green) 269.

[g] (N. Y. 1833) As a general rule equity will not interfere to compel specific performance of a contract, except where the legal remedy is inadequate and something remains to be done besides the mere payment of money.—Phyfe v. Wardell, 2 Edw. Ch. 47.

[h] (N. Y. 1886) Where plaintiff's demand is only for money, his remedy at law is ample, and he will not be aided by a decree for specific performance.—Martin v. Platt, 5 N. Y. St. Rep. 284.

[i] (Pa. 1867) Where a bill in equity for specific performance set forth a sale at a stipulated sum, increased in a contingency alleged to have happened, and prayed for a decree for the payment of the balance unpaid, it was *held* that, as the prayer was simply for the payment of money, the vendor had a complete and adequate remedy at law, and the bill was dismissed.—Appeal of Kauffman, 55 Pa. 383.

[j] (S. C. 1894) Equity will not compel specific performance of a contract to buy land, simply to enforce payment of the purchase money, but will leave the parties to their legal remedies.—Holley v. Anness, 41 S. C. 349, 19 S. E. 646.

VI. Difficulty of Ascertaining Measure of Damages.

[a] (U. S. 1902) A court of equity will enforce specific performance of a restrictive contract by injunction, where it is apparent from a view of all the circumstances of the case that it will subserve the ends of justice, as where

Digitized by Google

the damages caused by its violation are not susceptible of proof.—American Fisheries Co. v. Lennen, 118 Fed. 869.

[b] (Ky. 1876) An act allowing a person to sue the state, to determine its liability to him under a former statute providing for the purchase from him by the state of such a number of books as should be necessary to supply one copy thereof to each common school district that did not vote against the purchase, authorized such person to bring suit for specific performance; it being impossible to ascertain the amount of damages sustained by the failure of the state to carry out its contract.—Commonwealth v. Collins, 75 Ky. (12 Bush) 386.

[c] (Minn. 1903) Where the consideration for an agreement to make a will is that the promisee shall assume a domestic relation to the promisor and render services of such a character that it is practically impossible to estimate their value by any pecuniary standard, specific performance will be decreed.—Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. Rep. 609.

[d] (N. Y. 1896) When it is difficult to make compensation for damages for breach of an agreement, the court may compel specific performance by enjoining the parties thereto from violating it.—Williams v. Montgomery, 148 N. Y. 519, 43 N. E. 57.

[e] (N. Y. 1903) Where a vendor refuses to perform a contract under which the vendee is entitled to a designated quantity of pulp wood yearly for a certain period of years from designated premises, the remedy of the vendor at law is inadequate, where the future price of the wood and the cost of obtaining it is uncertain, and where the possibilities of destruction of the timber by fire or the taking of land by the state in the exercise of eminent domain prevent an accurate computation of the damages. Judgment (Sup. 1901) 66 App. Div. 617, 73 N. Y. Supp. 1146, reversed.—St. Regis Paper Co. v. Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967.

[f] (N. C. 1871) An exception to the general rule that every contract ought to be specifically enforced is that, when damages constitute an adequate satisfaction, the party should be left to his remedy at law. The exception, however, is confined to cases in which there is a certain measure of damages and money is a satisfactory compensation.—Barnes v. Barnes, 65 N. C. 261.

[g] (Pa. 1854) A recovery in damages is regarded as an inadequate remedy in cases where they are estimable only by conjecture, and not by accurate standard.—Finley v. Aiken, 1 Grant, Cas. 83.

[h] (Pa. 1903) Where damages at law are an insufficient remedy for breach of contract, because there is something peculiar in the subject of the contract, that cannot be represented by damages, and such damages are uncertain, a specific performance of the contract will be decreed.—Ralston v. Ihmsen, 204 Pa. 588, 54 Atl. 365.

[i] (Tex. 1906) It affirmatively appeared that evidence as to the amount of defendant's tonnage shipped by rail, the freight rates thereon, and all data needed for the measuring of damages to result from breaches of the contract were easily accessible and could always be obtained. *Held*, that plaintiff was not entitled to a decree for specific performance of the contract.—Lone Star Salt Co. v. Texas Short Line Ry. Co., 90 S. W. 863, 3 L. R. A. (N. S.) 828.

VII. Contracts to Devise or Bequeath.

[a] (Minn. 1903) A complaint alleging that decedent was unmarried, in poor health, and unpleasant to have around, and agreed that, if plaintiff and her husband would assist in caring for his wants and allow him to live with them until he died, he would leave his land at his death to plaintiff, and that the agreement was carried out by plaintiff and her husband, and deceased lived up to the time of his death with them, and was furnished with room, board, and washing, and was nursed in sickness, as it does not appear from the face of the complaint that plaintiff cannot be fairly compensated for the breach of the contract of the deceased to make his will in her favor, a demurrer to the complaint seeking specific performance of the contract was properly sustained.—Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. Rep. 609.

[b] (Mo. 1906) A contract fully performed to care for, give personal attendance to, and make a home for an aged man of the same nationality, worth

Digitized by Google

about $13,000, in return for a testamentary gift of property worth from $1,100 to $1,600, cannot be fully met by a money judgment for a few hundred dollars, based on the average pay for services, so as to preclude a specific performance of the contract.—Berg v. Moreau, 199 Mo. 416, 97 S. W. 901.

[c] (N. J. 1904) Where an agreement was entered into between a stepmother and stepson that, in consideration of his abandonment of any claim against his father's estate, she would leave certain property to him by will at her death, which was acquiesced in by both until her death, but not complied with by her, so that it would be impossible to restore him to the situation existing at the time of his father's death, an action at law for damages against the stepmother's estate would not afford an adequate remedy, and specific performance will be decreed in order to prevent a fraud.—Clawson v. Brewer, 67 N. J. Eq. 201, 58 Atl. 598.

VIII. Contracts for Personal Services or Acts.

[a] (Ala. 1854) A mail contractor cannot come into equity to enforce a contract with a plank road company for the transportation of the mail over its road, unless he shows by his bill that a court of law could not compensate him in damages for the breach of the contract.—Powell v. Central Plank Road Co., 24 Ala. 441.

[b] (Ala. 1895) Where a contract for a term of years provided for services on the part of one and payments on the part of the other, and that in default of payments by the latter the other might terminate the contract, it would not be specifically enforced at the instance of the latter, since he had an adequate remedy at law.—Electric Lighting Co. v. Mobile & S. H. Ry. Co., 109 Ala. 190, 19 South. 721, 55 Am. St. Rep. 927.

[c] (Colo. 1895) A complaint against an irrigation company, to compel it to furnish water according to its contract with plaintiff, alleged failure of defendant to deliver the water, and that it was impossible to secure water from any other source. *Held* that, as the complaint failed to show insolvency of defendant, no jurisdiction in equity was shown.—Fulton Irrigating Ditch Co. v. Twombly, 6 Colo. App. 554, 42 Pac. 253.

[d] (Idaho, 1905) Where by written contract decedent when living agreed to furnish plaintiff at a place named 2,500 cords of wood, plaintiff to furnish the money to chop and deliver the wood, that plaintiff complied with the conditions of the contract, that after delivery of 250 cords of wood by the administratrix of the estate of the decedent, and after she had agreed to carry out the contract, she refused to comply with it unless plaintiff would release 500 cords from delivery, he having furnished her large sums of money to complete the contract, a decree for specific performance of the contract will be granted.—Ridenbaugh v. Thayer, 10 Idaho, 662, 80 Pac. 229.

[e] (Ill. 1893) A father transferred property to his son in consideration of the son's agreement to support him during life. The son died first, having kept his agreement up to the time of his death. The property had been sold by the son, and its proceeds were not traced to the possession of his heirs and legal representatives. *Held*, that equity had no jurisdiction to enforce a specific performance of the agreement, the remedy at law being adequate.—Campbell v. Potter, 147 Ill. 576, 35 N. E. 364, affirming Potter v. Campbell (1892) 45 Ill. App. 174.

[f] (Iowa, 1892) Where a water company, under its contract with a city giving it an exclusive franchise, has established its plant, laid its water pipes in the streets, and private consumers have, at large expense, conducted the water into their houses, a provision of the contract making it the duty of the company to filter the water intended for domestic use will be specifically enforced at the suit of the city, as an action for damages by the private consumers would be wholly inadequate, and a forfeiture of the exclusive franchise of the company would entail on the city the needless expense of erecting new works.—City of Burlington v. Burlington Water Co., 86 Iowa, 266, 53 N. W. 246.

[g] (Me. 1893) A city's contract with the landowner to extend or construct a sewer through his land cannot be specifically enforced on mere allegations that the land is damaged, and that plaintiff is prevented from using it for

Digitized by Google

building lots; these not showing clearly an absence of redress at law.—Gove v. City of Biddeford, 85 Me. 393, 27 Atl. 264.

[h] (S. C. 1890) A contract in which defendant binds himself in a penal sum for the performance of certain work, and plaintiff binds himself to pay for such work when completed, does not entitle plaintiff to a decree for specific performance, as a breach of the contract may be compensated in damages.—McCarter v. Armstrong, 32 S. C. 203, 10 S. E. 953, 8 L. R. A. 625.

IX. Operation of Railroads, Establishment of Stations, and Construction of Crossings and Cattle Guards.

[a] (U. S. 1900) Where a railroad company, in consideration of a conveyance by plaintiff of a right of way through his land, agreed to establish and maintain a station on his land, plaintiff to operate the station and receive fees therefor, and did maintain such station for a period of years, after which it refused to do so longer, plaintiff's remedy is by an action at law, and a bill for specific performance will not lie. Decree, Wilson v. Winchester & P. R. Co. (C. C. 1897) 82 Fed. 15, affirmed.—Willson v. Winchester & P. R. Co., 99 Fed. 642, 41 C. C. A. 215.

[b] (U. S. 1905) A contract by a lessee railroad company to run its trains over the tracks and use terminal facilities of the lessor during the term of a lease for 999 years and to pay rental on a wheelage basis, if clearly established and valid, is specifically enforceable in equity on the ground of the avoidance of a multiplicity of suits, which would be vexatious and expensive and in which the relief obtainable would be inadequate.—Grand Trunk W. Ry. Co. v. Chicago & E. I. R. Co., 141 Fed. 785, 73 C. C. A. 43.

[c] (Ind. 1866) A suit for specific performance will not lie upon a covenant by a railroad company to maintain and keep in repair the cattle guards upon the land of the plaintiff, as the remedy at law is ample.—Columbus & S. R. Co. v. Watson, 26 Ind. 50.

[d] (Me. 1901) A decree for specific performance of a contract by a railroad company to construct a grade crossing may be refused where plaintiff can recover adequate pecuniary compensation for all damages that he may have sustained by the company's failure to perform its contract.—Goding v. Bangor & A. R. Co., 94 Me. 542, 48 Atl. 114.

[e] (Neb. 1902) Where land for right of way is conveyed to a railroad company on condition that undertrack crossings of certain dimensions are to be built and maintained for the convenience of a grantor, equity will decree a specific performance, and not leave the grantor to his action for damages, when specific performance alone will answer the purpose of justice.—Gloe v. Chicago, R. I. & P. Ry. Co., 65 Neb. 680, 91 N. W. 547.

[f] (N. J. 1906) P. L. 1903, p. 660, § 29, provides that when any railroad company shall not properly construct and maintain the bridges or other crossings of highways by its railroad tracks as required by law, it shall be lawful for the governing body of the township or municipality wherein such crossings are located to proceed by suit in equity to compel specific performance of the duties imposed by law on such company, and the court shall prescribe the crossing to be constructed or the repairs to be made. *Held*, that such section was not unconstitutional because it authorized the court to give a municipality a compulsory remedy by a suit in equity for specific performance, as distinguished from the Legislature's power to authorize a preventive remedy.—Borough of Metuchen v. Pennsylvania R. Co., 64 Atl. 484.

[g] (N. J. 1906) P. L. 1903, p. 660, § 29, provides that when any railroad company shall not properly maintain the bridges or other crossings or highways, the governing body of the township containing the crossings may proceed by a suit in equity to compel specific performance of the railroad's duties with reference thereto. *Held*, that a suit in equity to compel the alteration of a railroad crossing was maintainable under such section, regardless of the remedies by mandamus, ejectment, or indictment.—Borough of Metuchen v. Pennsylvania R. Co., 64 Atl. 484.

X. Contracts Relating to Mining.

[a] (U. S. 1899) A valid agreement, definite, and fair and reasonable in its terms, was made for the lease of a tract of coal land, to be mined by the

Digitized by Google

lessee. The lease would necessarily extend through a number of years. The quantity to be mined each year was uncertain, and payment of a royalty was to be made to the owner according to a sliding scale, varying from year to year. Owing to a known fault in the vein, but the extent of which was unknown, the total quantity of coal to be mined was very largely a matter of uncertainty. *Held*, that specific performance of the agreement would be decreed at suit of the lessee, on the ground of the inadequacy of his remedy at law for nonperformance, arising from the impossibility of determining the amount of his damages with any reasonable degree of certainty.—Oakford v. Hackley (C. C.) 92 Fed. 38.

[b] (Ohio, 1901) A lessee agreed to operate the mines in a workmanlike manner and mine a minimum tonnage therefrom, or pay a royalty thereon, whether mined or not. Such lease also provided for an inspection of the mines and of the books of the lessee by lessor; that lessor's lands should be mined to the fullest extent it could mine the same at a reasonable profit and find a market therefor; that lessor's lands should be given preference by lessee over other lands that might be mined by it. There was evidence that the mining operations were negligent, that entry and pillar coal were being abandoned, and that there was a failure by lessee to mine the tonnage as stipulated in the lease. *Held*, that the lessor, having an adequate remedy at law, cannot maintain an action for specific performance of the covenants of such lease.—Allison v. Luhrig Coal Co., 22 Ohio Cir. Ct. R. 489, 12 O. C. D. 504.

[c] (Va. 1889) Complainant, the owner of an ore bank, having an arrangement to deliver ore to a railroad company at a certain price per ton, entered into an agreement under seal with defendant, which recited that complainant leased to defendant the ore bank on condition that defendant mine, prepare, and deliver to the company a certain quantity of ore per week, and for each ton so delivered, as shown by the company's receipt, complainant and defendant were each to receive from the company a certain proportion of the price. The complaint alleged that defendant had failed to deliver the required amount to the company, and had abandoned the mine and refused to perform his covenants, and prayed that defendant be compelled to specifically perform the agreement of lease, and to pay over all sums due, and to become due, under the lease to complainant, and upon failure so to do that he be ordered to pay complainant a sum sufficient to compensate him for all damages sustained, or to be sustained, by reason of defendant's failure to perform the agreement. *Held* that, as the agreement was not a lease of realty, but a contract for personal acts and services involving labor, skill, and judgment, for the breach of which the remedy at law was adequate and ample, equity had no jurisdiction.—Campbell v. Rust, 85 Va. 653, 8 S. E. 664.

XI. Purchase or Sale of Waterworks.

[a] (U. S. 1906) Where a city has refused to perform its contract to purchase the waterworks of a company at a price named on their productive worth to be determined by appraisers, the water company has no remedy at law as complete and efficient as specific performance of the contract in equity. —Castle Rock Water Co. v. City of Aspen, 146 Fed. 8, 76 C. C. A. 516.

[b] (Mass. 1906) Specific performance of a water company's contract to sell its plant to a town will not be denied on the ground that there is an adequate remedy at law by an award of damages for breach of the contract.—Revere Water Co. v. Inhabitants of Town of Winthrop, 192 Mass. 455, 78 N. E. 497; Inhabitants of Town of Winthrop v. Revere Water Co., Id.

XII. Contracts Relating to Personal Property.

1. In General.

[a] (U. S. 1900) A Missouri corporation, doing business in the state of Montana, which has not sufficient assets in that state with which to respond in damages for the breach of a contract for the sale of personal property, may be treated as insolvent in that state, for the purpose of holding that an action at law for breach of the contract is an inadequate remedy, and of supporting a suit in equity for a specific performance of the contract, as the complainant should not be compelled to resort to a foreign jurisdiction to collect any judg-

Digitized by Google

ment he might recover.—McNamara v. Home Land & Cattle Co. (C. C.) 105 Fed. 202.

[b] (U. S. 1904) Under Rev. St. § 723 [U. S. Comp. St. 1901, p. 583], which provides that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law, such a court is without jurisdiction to decree the specific performance of a contract for the sale to plaintiff of a number of cows at a stated price per head, where there is no evidence to show that the cows have any distinctive or peculiar value, which cannot be determined in an action at law for damages, or that defendant is insolvent.—Kane v. Luckman (C. C.) 131 Fed. 609.

[c] (Ala. 1904) Defendants executed a subcontract to plaintiffs for the performance of certain government improvements, and agreed that, in case of breach, complainants should be entitled to the possession of defendants' personal property on the work with which to complete the same. On defendants' abandonment of the work, complainants brought detinue for such personal property, but before trial complainants filed a bill to compel specific performance of the contract, to obtain a delivery of such personal property, and to restrain defendants from removing the same, alleging that the remedy of detinue was inadequate, because defendants by executing forthcoming bonds could regain possession of the property. It was not alleged that defendants' breach of contract would result in any forfeiture of complainants' contract with the government, nor that time was of the essence of that contract, nor that the injuries flowing from defendants' breach could not be readily estimated and compensated for in damages. *Held*, that complainants had an adequate remedy at law, and that the bill was properly dismissed.—M. T. Lewman & Co. v. Ogden Bros., 143 Ala. 351, 42 South. 102.

[d] (Ark. 1906) Equity will not enforce a contract for the sale of an article of commerce which can at all times be bought in the market, and the remedy for a breach thereof is at law.—Block v. Shaw, 78 Ark. 511, 95 S. W. 806.

[e] (Ga. 1898) Equity will not decree specific performance of contracts relating to the sale of personal property where the damages resulting from failure to perform can be definitely ascertained, and furnish adequate compensation for nonperformance.—Carolee v. Handelis, 103 Ga. 299, 29 S. E. 935.

[f] (Idaho, 1898) A court of equity will decree a specific performance of a contract for the sale of chattels when damages at law will not afford a complete and adequate remedy.—Brady v. Yost, 6 Idaho, 273, 55 Pac. 542.

[g] (Ill. 1900) A vendor of a patent right cannot maintain a suit for specific performance of the contract of sale in order to enforce the payment of an agreed price therefor, since he has an adequate remedy at law. Judgment, Olsen v. Anderson, 90 Ill. App. 189, affirmed.—Anderson v. Olsen, 188 Ill. 502, 59 N. E. 239.

[h] (Me. 1844) The court of equity has power, under Rev. St. c. 96, § 10, to hear and determine "all suits to compel the specific performance of contracts in writing, * * * when the parties have not a plain and adequate remedy at law." But it must appear to the court that the contract is in writing, and in force as such; for, if merged in a judgment, it would no longer be a contract in writing, within the provisions of the statute. It should also appear that the plaintiff has not a plain and adequate remedy at law, for, if he has a judgment in his favor upon the contract, he must be held as having a plain and adequate remedy upon it; and if the contract be in reference to the personalty, and not to the realty, it is, with a few exceptions of a peculiar character, considered that a party has his appropriate remedy at law, and he will not be entitled to the aid of a court of equity to enforce the performance of it.—Bubier v. Bubier, 24 Me. (11 Shep.) 42.

[i] (Md. 1904) A contract for the sale of a lot of ordinary pine lumber, to be manufactured from a tract of timber and to be of specified widths and thickness, is subject to the general rule against the right to specific performance where there is an adequate remedy at law.—Neal v. Parker, 98 Md. 254, 57 Atl. 213.

[j] (Md. 1904) A contract for the sale of a lot of ordinary pine lumber to be manufactured from a tract of timber is subject to specific enforcement

Digitized by Google

under Acts 1888, p. 415, c. 263 (Code Pub. Gen. Laws, art. 16, § 199), providing that specific performance shall not be refused on the ground of an adequate remedy in damages unless the resisting party shows property from which they may be made, and gives a bond as prescribed therein.—Neal v. Parker, 98 Md. 254, 57 Atl. 213.

[k] (N. J. 1904) It is not an answer to a suit for specific performance of a contract for the sale of a chattel that the seller has an action at law for the whole price; the difficulties in such remedy render a court of chancery convenient, if not necessary.—Law v. Smith, 68 N. J. Eq. 81, 59 Atl. 327.

[l] (N. M. 1900) Insolvency of the vendor, standing alone, will not authorize the specific enforcement of a contract for the sale of chattels, not furnishing, for other reasons, a basis for equitable cognizance.—Gillett v. Warren, 10 N. M. 523, 62 Pac. 975.

[m] (N. Y. 1904) Where the complaint alleged that plaintiff agreed to buy, and defendant agreed to sell, certain participating subscription rights in a corporation underwriting syndicate; that defendant had refused to perform the contract, and had received a part of the subscription and dividends to which plaintiff was entitled; that the value of the subscription rights was very great; and prayed for a specific performance of the contract, and for a money judgment for the sums received by defendant on account of subscription rights, and such further relief as might be proper—it did not state a case for equitable relief.—Gilbert v. Bunnell, 92 App. Div. 284, 86 N. Y. Supp. 1123.

[n] (N. Y. 1906) A party in a contract pertaining to personalty is confined to an action for damages for a breach thereof, unless he is entitled to the thing contracted for in specie, which to him has some special value, and which he cannot readily obtain in the market, or in cases where it is apparent that compensation in damages would not furnish a complete and adequate remedy. Order (1905) 103 App. Div. 463, 93 N. Y. Supp. 113, reversed. —Butler v. Wright, 186 N. Y. 259, 78 N. E. 1002.

[o] (Ohio, 1900) Where a vendee of personalty, who had disposed of same so that it could not be replevied, agreed to sign notes and give a chattel mortgage, and refused to do so, this constituted a breach of his contract, for which a suit for damages will lie; and hence a specific performance of the contract will not be decreed, it not appearing that the vendee was insolvent.—Giesenkamp v. Radel, 8 Ohio N. P. 276, 10 Ohio S. & C. P. Dec. 559.

[p] (Pa. 1899) Equity will not decree specific performance of a contract for the sale of personalty, the remedy at law being sufficient.—Northern Cent. Ry. Co. v. Walworth, 12 York Leg. Rec. 121.

[q] (Va. 1901) A suit to compel the specific performance of a contract of sale of certain whisky stored in a United States warehouse, and to enjoin defendant from taking possession thereof,—the bill alleging the insolvency of the defendant,—was brought pending an action of detinue by the same complainant to recover possession of the whisky. Code, § 2907, provides that, on the plaintiff in detinue making affidavit that there is good reason to believe that the defendant is insolvent, the clerk of the court shall issue an order to the proper officer to seize the property mentioned in such affidavit. *Held*, that complainant had an adequate remedy at law.—Langford v. Taylor, 99 Va. 577, 39 S. E. 223.

2. Issuance or Transfer of Corporate Stock.

[a] (U. S. 1890) Where it appears from the face of the complaint, in an action to compel the issuance of stock by defendant, that there can be no specific performance of the contract under which complainants claim, and that the recovery, if any, must be limited to a money decree, for damages for nonperformance, the complainants have a complete and adequate remedy at law, and an action in equity will not lie.—Summerlin v. Fronteriza Silver Min. & Mill. Co. (C. C.) 41 Fed. 249.

[b] (Cal. 1901) Civ. Code, § 3384, provides that, except as otherwise provided, specific performance of an obligation may be compelled. Section 3387 declares that it is presumed that the breach of an agreement to transfer personal property can be adequately relieved by damages. Section 3389 recites that a contract otherwise proper to be specifically enforced may be so enforced,

Digitized by Google

though a penalty is imposed, or the damages are liquidated for its breach, and the party in default is willing to pay the same. The vendor of land contracted to convey the same and certain shares of stock in consideration of the vendee's making certain improvements, the money value of which, as well as that of the land, was not fixed; nor was the price of the stock determined. *Held*, that damages would not afford an adequate remedy, and that specific performance of the contract to transfer the stock would be enforced.—Fleishman v. Woods, 135 Cal. 256, 67 Pac. 276.

[c] (Cal. 1905) Defendant agreed, in consideration of 5,000 shares of a block of 17,500 shares of the stock of a mining company to be given to him, and in further consideration of the dismissal of a suit concerning the 17,500 shares, to effect a settlement with the claimant of such disputed stock, surrender the certificate for cancellation, receive 5,000 shares, and cause to be issued to plaintiffs the balance. *Held* that, where plaintiffs in a suit to compel specific performance of such agreement, alleged that with the 12,500 shares they would have a majority of the stock of the company, while if defendant retained the 17,500 shares he would control a majority of the stock, would so conduct the affairs of the company as to destroy the value of the stock owned by plaintiffs, and that the stock was of uncertain value in the market at the time, but would be of great value if plaintiffs were enabled to retain their control of the company and defendant was not permitted to secure control, the complaint showed that plaintiffs did not have an adequate remedy at law. —Sherwood v. Wallin, 1 Cal. App. 532, 82 Pac. 566.

[d] (Minn. 1904) Where plaintiff sues for specific performance of the contract to give him certain shares of common stock of a corporation in payment for a transfer to it of certain land contracts, plaintiff has no adequate remedy at law for the recovery of damages for the breach of the contract, where the stock in question has no market value and has never been sold.—Selover v. Isle Harbor Land Co., 91 Minn. 451, 98 N. W. 344.

[e] (Mo. 1899) Ordinarily specific performance of a contract for the transfer of corporate stock will be denied, but where the contract calls for the transfer of sufficient stock to make the transferee the owner of half of the entire stock, so that the chief value is not the money value, but the power and influence given in the management of the corporation, specific performance is the proper remedy.—O'Neill v. Webb, 78 Mo. App. 1, 2 Mo. App. Rep'r, 141.

[f] (N. Y. 1903) A complaint for specific performance of contract to convey stock not having alleged that the stock had any peculiar value, or that the computation of its value was difficult, and there being nothing to show lack of adequate remedy at law, specific performance of the contract would not be decreed.—Bateman v. Straus, 86 App. Div. 540, 83 N. Y. Supp. 785.

[g] (N. Y. 1904) A bill in equity is not maintainable to compel specific performance of a corporation's contract to issue stock in consideration of services rendered to it, in the absence of an allegation and proof that the stock has a peculiar value, or that plaintiff could not fully recover in an action at law the damages resulting to him from defendant's breach of contract.—Kennedy v. Thompson, 97 App. Div. 296, 89 N. Y. Supp. 963.

[h] (N. Y. 1905) Where defendant agreed to deliver to plaintiff certain corporate stock in consideration of shares of the stock of another corporation, together with the resignations in writing of all the latter's directors or trustees, on the breach of such contract by defendant, plaintiff had an adequate remedy at law for the recovery of damages, and could not, therefore, sue for specific performance, though defendant owned 92 per cent. of the stock of the corporation to be delivered to plaintiff, which stock was not listed on any stock exchange, nor purchasable in the market.—Butler v. Wright, 103 App. Div. 463, 93 N. Y. Supp. 113.

[i] (N. Y. 1905) In a suit for specific performance of a contract for the delivery of corporate stock, the fact that defendant assented that the suit be tried by a referee was not a waiver of his right to object that plaintiff was not entitled to specific performance on the ground that he had an adequate remedy at law.—Butler v. Wright, 103 App. Div. 463, 93 N. Y. Supp. 113.

[j] (N. Y. 1905) An action to compel specific performance of a contract to deliver stock in a specified corporation, which plaintiff has no special interest in acquiring, except for the pecuniary advantage which will accrue to him

Digitized by Google

from its ownership, cannot be maintained simply because it appears that there have been no sales of the stock in question, that it is not listed on any exchange, and that defendant is the owner of a large majority of the stock, so that it will be difficult, although not impossible, to ascertain its value.—Clements v. Sherwood-Dunn, 108 App. Div. 327, 95 N. Y. Supp. 766.

[k] (N. Y. 1906) The mere fact that a stock is not listed and sold, or offered for sale, so that a market value may be readily established, does not warrant the interposition of equity to decree specific performance of a contract with reference thereto, where the value of the stock or right can be otherwise ascertained and the damage established.—Ehrich v. Grant, 111 App. Div. 196, 97 N. Y. Supp. 600.

[l] (Pa. 1899) Where defendant refused to transfer to a purchaser from plaintiff certain railroad stock which he had in his possession, equity will not take jurisdiction to compel the transfer, plaintiff's remedy in an action for damages being adequate.—Rigg v. Reading & S. W. St. Ry. Co., 191 Pa. 298, 43 Atl. 212.

[m] (Pa. 1899) Specific performance of a contract for the sale of stocks cannot be defeated by a contention that there is no irreparable injury, as the buyer has an adequate remedy at law, where a money consideration, even if obtainable, cannot afford a substitute for the sale.—Northern Cent. R. Co. v. Walworth, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683.

[n] (Pa. 1899) A specific performance of a contract for the sale of stocks and bonds of a particular company may be decreed, where they cannot be secured except by force of the particular contract.—Northern Cent. R. Co. v. Walworth, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683.

[o] (Pa. 1902) Under a contract whereby the stock of a corporation in the hands of a third person is to be delivered when certain provisions of the contract are complied with, and such stock has no ascertainable value, but carries with it a controlling voice in the management of the corporation, a decree for specific performance will be granted where the conditions named in the contract are fulfilled.—Rumsey v. New York & P. R. Co., 203 Pa. 579, 53 Atl. 495.

[p] (Pa. 1906) Where the owner of stock sells it with an option to repurchase it, or pledges it, he may sue for a retransfer to himself, where the stock was not purchasable in the market, had no ascertainable market value, and it had a peculiar value to plaintiff, greater than the market price at the time of transfer.—Eichbaum v. Sample, 213 Pa. 216, 62 Atl. 837.

XIII. Contracts Relating to Real Property.

1. *In General.*

[a] A recovery in damages is not in equity regarded as an adequate remedy for a breach of contract for the sale of land.

—(U. S. 1906) Wilhite v. Skelton, 149 Fed. 67, 78 C. C. A. 635, reversing judgment (1904) 5 Ind. T. 621, 82 S. W. 932;
(Me. 1849) Foss v. Haynes, 31 Me. 81;
(N. Y. 1865) Losee v. Morey, 57 Barb. 561;
(Pa. 1854) Finley v. Aiken, 1 Grant, Cas. 83.

[b] (Ala. 1904) A contract for a mortgage, though on real estate, will not be specifically performed, in the absence of allegation and proof of insolvency of the debtor, or some other fact showing the case to be of equitable cognizance, or that the remedy at law is not adequate.—Brown v. E. Van Winkle Gin & Machine Works, 141 Ala. 580, 39 South. 243, 6 L. R. A. (N. S.) 585.

[c] (Ga. 1848) Where a purchaser of a tract of land at a sheriff's sale refused to comply with the terms of the sale, and the land was resold for less money, it was *held* that a court of equity would not entertain jurisdiction to compel the first purchaser to a specific performance, at the instance of the defendant in the execution; there being an adequate and sufficient remedy otherwise under the statute of 1831.—Orr v. Brown, 5 Ga. 400.

[d] (Iowa, 1906) An open ditch having previously existed on defendant's land, through which surface water from plaintiff's land drained, and the ditch having been rendered ineffective by defendant's stock, an oral contract was made with defendant to do certain tiling on his own land to furnish

Digitized by Google

plaintiff an outlet for his surface water, and plaintiff was to tile about 60 rods on defendant's land in continuance of the drain, but, after plaintiff bought the material, defendant refused to permit him to proceed. *Held*, that plaintiff had an adequate remedy at law, and was not entitled to specific performance.—Robinson v. Luther, 109 N. W. 775.

[e] (Me. 1892) A bill in equity for specific performance of a contract to convey land must show that plaintiff has not an adequate remedy at law by action for breach of contract or otherwise.—Porter v. Frenchman's Bay & Mt. D. Land & Water Co., 84 Me. 195, 24 Atl. 814.

[f] (Mich. 1894) Defendant contracted to pay one-half of the purchase price of land in cash, and to secure the balance by a mortgage on the land. *Held*, that a bill to compel defendant to make the cash payment and to execute the mortgage was for specific performance, and not merely for recovery of the consideration.—Newberry v. Slafter, 98 Mich. 468, 57 N. W. 574.

[g] (N. J. 1888) Specific performance of a contract to convey land of small value will not be decreed, where there are no equitable grounds and there is an adequate remedy at law much less burdensome in costs.—Blake v. Flatley, 44 N. J. Eq. 228, 14 Atl. 128, 6 Am. St. Rep. 886.

[h] (N. Y. 1845) Equity will enforce the specific performance of covenants to make improvements on the covenantor's own land, where the covenantee cannot be compensated for the breach by damages.—Stuyvesant v. City of New York, 11 Paige, 414.

[i] (Pa. 1842) Where a recovery in damages would not be an adequate remedy for the assertion of plaintiff's rights under a land contract, courts having equity powers will entertain jurisdiction.—Dalzell v. Crawford, 1 Pars. Eq. Cas. 37, 2 Pa. Law J. 17.

[j] (S. C. 1897) The jurisdiction of courts of equity in actions for the specific performance of contracts for the sale of lands is exclusive, and not dependent on the inadequacy of the legal remedy, whether the plaintiff is a vendor or purchaser.—Hammond v. Foreman, 48 S. C. 175, 26 S. E. 212.

[k] (Va. 1903) For a court of equity to enforce a parol contract for the conveyance of land upon the ground of part performance, the acts of part performance must be of such a character as to be incapable of compensation in damages, if specific execution of the contract were denied.—Venable & Bays v. Stamper, 102 Va. 30, 45 S. E. 738.

[l] (W. Va. 1907) An agreement or award whereby an uncertain division line between adjoining tracts owned by different persons is identified and made certain as to its location is not a contract for the sale of land, and as the legal remedy for nonperformance is complete and adequate, there is no jurisdiction in equity to decree specific performance of the agreement or award. —Orr v. Cox, 56 S. E. 522.

[m] (Wis. 1892) A suit in equity to declare void a deed granting an easement on condition, on the ground that the condition has not been complied with, or to enforce its performance, cannot be resisted on the ground that plaintiff has an adequate remedy at law in ejectment, since ejectment is not an appropriate remedy for the recovery of a mere easement.—Pinkum v. City of Eau Claire, 81 Wis. 301, 51 N. W. 550.

2. Rights of Vendor.

[a] (Conn. 1855) Where a contract for the purchase of real estate for a public purpose, as a highway, railroad, canal, park, etc., remaining altogether unexecuted, is subsequently abandoned by the purchaser, and the vendor retains possession of the estate agreed to be sold, his remedy is at law, and not in equity.—Whitney v. City of New Haven, 23 Conn. 624.

[b] (Conn. 1855) The city of New Haven agreed to buy of the plaintiff certain lands, and as much of the water of Mill river as should be necessary to supply said city with pure water, for the consideration of $50,000, and of the covenant to construct a costly dam, and a canal to convey, for the plaintiff's use, the surplus water of said river. The plaintiff, having never parted with the possession of his property, brought his bill in equity to enforce the specific performance of such agreement. *Held*, that he had the means of complete redress at law, and that such bill must be dismissed.—Whitney v. City of New Haven, 23 Conn. 624.

Digitized by Google

[c] (Conn. 1889) Specific performance of a contract to convey land will not be refused on the ground of an adequate remedy at law, as there could be recovered at law only the excess of the sum agreed to be paid above the market value when the contract was to be performed, and this is an inadequate remedy.—Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87.

[d] (Conn. 1896) A vendor stands on the same footing with respect to specific performance as a vendee, and will be denied relief, therefore, on account of a claimed adequate remedy at law, only in cases where specific performance would be productive of special hardship or inconvenience.—Andrew v. Babcock, 63 Conn. 109, 26 Atl. 715, following Hodges v. Kowing (1889) 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87.

[e] (Ga. 1855) A. sued at law to recover of B. for work and materials expended upon B.'s premises. B. filed his bill, setting up a parol contract between A. and himself to the effect that, on completion of the improvements, A. should be entitled to a deed of one-half the premises as his compensation, and praying for specific performance and the perpetual injunction of A.'s suit at law. B.'s possession of the premises and rents thereof had been undisturbed. *Held*, that B.'s remedy at law is ample, and his bill cannot be sustained.—Printup v. Mitchell, 17 Ga. 58, 63 Am. Dec. 258.

[f] (Me. 1896) Specific performance of a contract to purchase land would not be decreed the vendor on the ground of the purchaser's part performance, where, pending an examination of the title, the purchaser, with the vendor's consent, entered on the land, and plowed a driving park on it, and kept possession for several months without signing the contract or accepting deeds tendered according to its terms, there being an adequate remedy at law for the damages done the land by the plowing, and the principle of equitable estoppel having no application.—Bennett v. Dyer, 89 Me. 17, 35 Atl. 1004.

[g] (Md. 1902) Where land had been sold, and a part of the price paid, the vendor is entitled to sue in equity for specific performance; his remedy at law for damages being inadequate.—Maryland Clay Co. v. Simpers, 96 Md. 1, 53 Atl. 424.

[h] (N. J. 1900) Equity will not ordinarily enforce specific performance of a covenant by a grantee to build on the premises conveyed, since damages at law for breach of the covenant are generally an adequate remedy, and the court has no power to compel performance of such condition.—Madison Athletic Ass'n v. Brittin, 60 N. J. Eq. 160, 46 Atl. 652.

[i] (N. Y.) The court of chancery has jurisdiction, upon a bill filed by the vendor in a contract for the sale of real estate, to decree specific performance, although the complainant has a remedy at law upon the contract.—(1835) Phyfe v. Wardell, 5 Paige, 268, 28 Am. Dec. 430; (1848) Crary v. Smith, 2 N. Y. (2 Const.) 60.

[j] (N. Y. 1903) Where a purchaser of a long lease of a brickyard, buildings, machines, and trade fixtures did not claim that the vendor's action to enforce the contract was by suit at law, or that the vendor had an adequate legal remedy, such vendor was entitled to maintain a suit for specific performance of the agreement, a recovery of money damages being inadequate.—Covert v. Brinkerhoff, 41 Misc. Rep. 230, 84 N. Y. Supp. 4.

[k] (Pa. 1842) Under the law a recovery in damages is not an adequate remedy for the vendor of land, where the cash payments by the purchaser are to be made by installments, and the property is sold subject to existing incumbrances. Specific performance will be decreed.—Dalzell v. Crawford, 1 Pars. Eq. Cas. 37, 1 Pa. Law J. 155.

[l] (Va. 1878) A bill by a vendor against a purchaser for specific performance, where the purchaser has made a partial payment and taken possession under a contract which provides for a deed and a lien for the balance of the purchase money, is not demurrable on the ground that plaintiff has his remedy by an action at law for the purchase money, since, though he might sue at law, it would not afford him a remedy against the land, and hence equity has jurisdiction of the case.—Ayres v. Robins, 30 Grat. 105.

3. Rights of Vendee.

[a] (U. S. 1893) Mandamus in a state court to enforce the conveyance of real property as to which a clear legal right is asserted, is not such an ade-

Digitized by Google

quate remedy at law as to bar the equitable jurisdiction of a federal court.—Provisional Municipality of Pensacola v. Lehman, 57 Fed. 324, 6 C. C. A. 349, 13 U. S. App. 411, distinguishing Smith v. Bourbon Co. (1888) 127 U. S. 105, 8 Sup. Ct. 1043, 32 L. Ed. 73.

[b] (U. S. 1898) Plaintiff entered into negotiations to purchase land in his own name for defendant B. from defendant J., and, after plaintiff had made a payment as earnest money, B. purchased from J. direct, ignoring plaintiff. *Held*, that plaintiff could not maintain a bill for specific performance against defendants, his remedy at law against B. being adequate.—Thweatt v. Jones, 87 Fed. 268, 30 C. C. A. 636.

[c] (Conn. 1844) A., being indebted to B. by two promissory notes, in the sum of $150, in consideration thereof executed to him a deed purporting to convey a parcel of land, the boundaries of which were given on three sides so far as to embrace land sufficient to pay the sums due on such notes, at the appraisal of two disinterested men, to be thereafter appointed for that purpose. A. soon afterwards died, without anything further having been done relating to the appraisal or the appointment of appraisers, leaving a large real estate, and personal estate more than enough to pay all his debts. B., retaining the notes, then brought a bill in chancery against the heirs of A., praying the court to ascertain the quantity of land necessary to pay the notes, and set it off to him in payment. *Held*, that B. was not entitled to the relief sought; no reason being shown why payment of the notes in money would not be as beneficial to him as payment in land at the appraisal of men.—Meeker v. Meeker, 16 Conn. 403.

[d] (D. C. 1905) A bill in equity for the specific performance of a contract for the sale of land at a given price is properly dismissed on the ground that the complainant has an adequate remedy at law, where it alleges that the complainant has entered into a binding contract to convey the land for a specified price, and seeks a conveyance from the defendant, whose solvency is not denied, for the sole purpose of performing that contract.—Hazelton v. Miller, 25 App. D. C. 337.

[e] (Ill. 1877) A vendor's written guaranty that a certain street should be extended and opened through the land within two years, with contract to refund on reconveyance if the street should not be opened, will be enforced by a court of equity, although the purchaser has a remedy at law to recover damages for the breach.—Kerfoot v. Breckenridge, 87 Ill. 205.

[f] (Md. 1878) Complainant purchased land from defendant, paying part of the purchase price in cash, and executing a mortgage for the balance; but, before the mortgage was delivered, defendant sold the land to another. *Held*, that complainant had an adequate remedy at law, and was not entitled to have the deed to the second purchaser set aside and the original contract specifically enforced.—Shriver v. Seiss, 49 Md. 384.

[g] (Mich. 1900) Complainant alleged that defendant deeded land to complainant and wife in fee simple, in which he owned only a half interest, and that the deed was accepted without knowledge of the fraud, which was not denied by the defendant. *Held*, that complainant was entitled to maintain a bill for specific performance, and was not obliged to bring an action at law on the covenants.—Wilkinson v. Kneeland, 125 Mich. 261, 84 N. W. 142.

[h] (Mich. 1906) After the making of a contract for the sale of land, the vendee went into possession and made improvements thereon. He promptly paid all the installments of the purchase price except the last, but refused to accept the deed tendered, and sued for breach of contract, in which action he was defeated on the vendor's tender of the deed in question, after which she refused to deliver such deed, though retaining the entire purchase price paid up to that time. *Held* that, it being impossible to place the parties in statu quo, complainant was entitled to specific performance on payment of the balance of the price with interest.—Wilson v. Knapp, 143 Mich. 64, 106 N. W. 695.

[i] (Mich. 1907) Where plaintiff, the grantee in an option for the purchase of land, contracted during the period of the option to sell the land to a third person, plaintiff was not precluded from maintaining a suit for specific performance of the option contract, on the ground that he had an adequate remedy at law.—Solomon Mier Co. v. Hadden, 111 N. W. 1040.

Digitized by Google

[j] (Mich. 1907) The fact that an option for the purchase of land provided that the grantee might have a choice of an action at law or specific performance, while the grantor's damages were stipulated, did not preclude the grantee from maintaining a suit for specific performance.—Solomon Mier Co. v. Hadden, 111 N. W. 1040.

[k] (Mo. 1905) Though services were rendered and money loaned under the distinct understanding that complainant was to be remunerated therefor by a conveyance of land, decedent's estate being solvent, complainant had an adequate remedy at law therefor.—Brevator v. Creech, 186 Mo. 558, 85 S. W. 527.

[l] (Neb. 1882) Where a purchaser of lands is entitled to a specific performance of a contract for the sale thereof, the vendor cannot object that the purchaser has an adequate remedy at law by action for damages for breach of the contract.—Gartrell v. Stafford, 12 Neb. 545, 11 N. W. 732, 41 Am. Rep. 767.

[m] (N. J. 1875) Where the party seeking performance of a contract knew, at the time the contract was made, that the defendant did not have title to part of the land he agreed to convey, and where he shows no special ground entitling him to equitable relief; where he has not changed his situation, in consequence of the contract, so that he must suffer loss if it is not specifically performed, and his claim to relief stands solely upon his right to the advantage he has obtained by the contract; and where nothing appears from which it can be fairly inferred a suit at law will not afford him full and complete redress—a court of equity will deny compensation and leave the complainant to his ordinary legal remedy.—Peeler v. Levy, 26 N. J. Eq. (11 C. E. Green) 330.

[n] (N. J. 1882) A covenant, in a deed to a railroad company by the riparian commissioners, that, if the state had not power to vest title in a grant already made to another company, the state would release to the railroad company the previously granted premises free from any incumbrance thereon, can only be enforced by a bill for specific performance.—American Dock & Improvement Co. v. Trustees for Support of Public Schools, 35 N. J. Eq. (8 Stew.) 181.

[o] (N. Y. 1904) Where a company contracted for the purchase of land along a river to develop a water power for use in its mills, it has no adequate remedy at law for a breach of the contract as to certain tracts of the land.—International Paper Co. v. Hudson River Water Power Co., 92 App. Div. 56, 86 N. Y. Supp. 736.

[p] (N. C. 1851) A. made a parol contract for the purchase of land from B., for which he paid by delivering a horse, and also a bond on one C., which he caused to be made payable to B. C. died insolvent, the bond not having been collected. *Held*, on a bill for specific performance or compensation, to which B. pleaded the statute against parol contracts for land, that A. was entitled to compensation; that, so far as related to the horse, if that had been the only subject of controversy, A. would have had no claim to relief, as he could have had complete redress at law upon the rescission of the contract, but, as he had no legal redress as to the bond, that equity would entertain jurisdiction of that matter, and, thus taking jurisdiction of part of the case, would take jurisdiction of the whole, and grant the relief prayed for.—Chambers v. Massey, 42 N. C. 286.

[q] (N. C. 1904) A purchaser of land, on breach of the contract of sale, may sue for specific performance, and is not bound to bring an action at law for damages.—Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. Rep. 877.

[r] (Pa. 1869) Where a vendor has promised to have satisfied a mortgage resting on the granted lot and the adjoining one jointly, and fails to do so, the purchaser has not such an adequate remedy at law as will bar him of specific performance.—Weir v. Mundell, 3 Brewst. 594.

Digitized by Google

(153 Fed. 241.)

ARMOUR & CO. v. SKENE.

(Circuit Court of Appeals, First Circuit. February 19, 1907.)

No. 671.

1. WITNESSES—CROSS-EXAMINATION—COLLATERAL MATTERS.

It was not an abuse of discretion for the trial court to permit a witness on cross-examination to be asked, for the purpose of discrediting him, whether he had been drinking on the day of the injury and at the time of the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1106–1108.]

2. EVIDENCE—EXPRESSIONS OF PAIN.

In an action for injuries, statements of witnesses as to plaintiff's expressions of pain were competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 377–382.]

3. APPEAL—HARMLESS ERROR.

In an action for injuries to plaintiff by defendant's runaway team, a witness testified that C., defendant's superintendent, was at the scene within a few minutes after the accident and identified the team as belonging to defendant, and, in reply to a general question as to what the superintendent said, the witness answered: "This is Armour's team that has done this, and we are liable." On objection, the court allowed the answer to stand de bene, and stated that he would instruct the jury, without further testimony, that it had no effect, and as to the question of liability it had no probative value. During the trial it was admitted that C. was defendant's local superintendent, and that the team belonged to defendant, and the court expressly charged that C.'s statement could not be considered at all as an admission of liability. *Held*, that defendant was not prejudiced, under such circumstances, by the admission of such answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170, 4178–4184.]

4. SAME.

Where, in an action for injuries to plaintiff by a collision with defendant's runaway team alleged to have been negligently permitted to remain unattended in a street, the evidence establishing the identity of the team as belonging to defendant, and that the horse was left at the curbstone with the reins thrown over his back, and later started to run, and came into collision with plaintiff's vehicle and caused the injury, such facts warranted a verdict in favor of plaintiff, and hence defendant was not prejudiced by a technical error in the admission of evidence that the driver was relieved by defendant of his employment nearly a year after the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4034.]

Putnam, J., dissenting.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Philip B. Adams and Arthur P. Hardy, for plaintiff in error.

Charles H. Fiske, Jr. (Andrew Fiske, on the brief), for defendant in error.

Before PUTNAM and LOWELL, Circuit Judges, and ALDRICH, District Judge.

Digitized by Google

ALDRICH, District Judge. Agnes Skene was injured in Waltham by a runaway team, which came into collision with a buggy in which she was sitting. It was alleged that the team belonged to Armour & Co., and that the injury resulted from the carelessness of its agents. The particular act of negligence, pointed out in the proofs, was that the driver threw the reins over the horse's back, and went away leaving him unhitched in the street.

There are over 40 assignments of error in this case, something, at least, unusual in an ordinary personal injury case. We do not think it necessary, nor would it be useful, to discuss the merit of the various assignments seriatim. We do not characterize the exceptions as a whole as frivolous, but it is true that they are largely frivolous, and controlled by principles of law and rules of practice so familiar as not to require discussion. As, for instance, the exception with reference to the cross-examination of Macdonald, the driver, who was asked if he had been drinking on the day of the injury, and whether he had been drinking at the time of the trial, is something controlled by a familiar rule of practice. It is quite true that whether he had been drinking on the day of the trial, something like six years after the injury, was clearly collateral to the question of negligence at issue, and had nothing to do with it; but it is not unusual or improper on cross-examination to resort to reasonable collateral expedients for the purpose of discrediting a witness. It is unquestionably within the discretion of the trial judge to give reasonable scope in that respect, and it is a discretion not reviewable except in cases involving extreme and clearly unwarrantable latitude. And the exception with reference to the city ordinance, which was received and properly explained as something not conclusive, but as a piece of evidence to be considered with the other proofs in the case as bearing upon the alleged fact of negligence which the jury were to determine as an ultimate question, and the numerous exceptions with reference to the opinions of nonexperts and the statements of witnesses as to the plaintiff's expressions of pain, involve no unfamiliar or unsettled questions.

The only two assignments of error which we feel called upon to consider at length are those which relate to the admission of evidence both of which involve technical error.

It was a necessary element of Miss Skene's case to show that the team belonged to the company. To do this, as properly might be done, a witness was called to show that Mr. Cunningham, the local superintendent of the company, was at the scene within a few minutes of the accident, and identified the team as one belonging to Armour & Co. The question, which we think we ought to accept as intended to identify the team, an identification competent to be proven by the admissions of the superintendent, was rather broad, as the witness was asked the general question as to what Cunningham said, and the witness replied: "This is Armour's team that has done this, and we are liable." Although there was no direct proof as to the relation which Cunningham sustained to the Armour & Co. business, it did appear in various ways that he assumed direction of affairs, and at the end of the trial the fact was not at all in controversy that he was local superintendent. Therefore the first part of the answer as to the identity of the team was com-

Digitized by Google

petent as relating to something within the scope of his authority. Moreover, this part of the exception is based upon the merest fiction, because it was practically conceded before the trial ended that it was an Armour & Co. team that injured Miss Skene. It was necessary, however, for the plaintiff at the outset to offer proofs tending to connect the injury with an Armour & Co. team, because it was a thing then apparently not conceded. This being so, it was not an unusual thing to allow that part of the answer of the superintendent to stand de bene, and, when upon the whole case it became a conceded fact without direct proof that he was local superintendent, so much of the answer as related to the identity of the team was rendered competent. But while that part of the exception relating to identity became mere fiction at the end of the trial, because it relates to a thing not remaining in controversy, it is still of significance upon the question as to what the purpose was in putting the original question. At the stage of the trial at which the question was asked, the matter of identity was something requiring proof, and we think it hardly reasonable to assume, because the fact of identity became a conceded fact later on, that the purpose of counsel was alone to develop the incompetent matter as to liability.

The last part of the answer as to liability was incompetent. But we think it only reasonable to assume that the incompetent part was not brought out intentionally. Objection was promptly made, and the court said: "I shall admit it de bene, and I shall instruct the jury that, without further testimony, it has no effect, and as to effect including liability it may not be of the least probative value." Thus the court removed present consideration so far as it could, and left the answer to stand, to be made good as to the question of identity, provided Cunningham's relation to the company should be established, at the same time making a distinction against that part which related to liability as something which might not be of the least probative force under any circumstances. Later, by way of instruction, the court limited the statement to the admission that the team belonged to the defendant, and expressly and emphatically told the jury that it could not at all be considered as an admission of liability. We think a formal and impressive statement of that kind by way of instruction is quite as effective in the direction of removing inadvertent, incompetent matter, especially when made in support of an admonition given at the moment of its being delivered from the witness stand, as any of the various means adopted for relieving a trial from the influence of accidental and incompetent statements made in the hearing of a jury. Trials can only be as fair as "the lot of humanity will admit," and it often happens that witnesses in answering, unwittingly and to the surprise of counsel, mix incompetent matter with the competent, and the only relief, as trials go, is through removing the effect by proper caution and admonition.

We must presume that the jurors understood the court to mean what it said, and considered the case independently of the statements of Cunningham as to liability, as the court told them they should do. If there were anything in such a situation leading to a reasonable suspicion that the incompetent matter was purposely brought out, the verdict would, of course, be set aside, partly upon the ground of punishment, and partly upon the ground that it made the trial an unfair one. It often happens

Digitized by Google

as trials go, and it cannot be otherwise in the very nature of things, that incompetent, and in a sense prejudicial, matter crops out accidentally and without design on the part of anybody. It usually comes from untrained witnesses who have no knowledge as to what is competent and what is incompetent, and such matter is generally removed by a ruling, and nothing more is thought about it. These things are inevitable, and it is necessary in the administration of justice that the trial should be accepted as a fair one, if the effect is cured by proper cautions and instructions from the trial court. It sometimes happens that incompetent matter is ruled in, after discussion and deliberation, as something competent for the jury to consider, and, when found later in the trial to be incompetent, that it is withdrawn from the case under strong cautions to the jury, and the authorities are numerous which sustain verdicts as based upon a fair trial under such circumstances. Furthermore, as to the matter under consideration, it cannot with technical exactness be said that error was committed, because the evidence in question was never in fact admitted; it at most was only allowed to stand de bene under caution. But, quite aside from this, we think we ought to hold that the effect of what Cunningham said about liability was eliminated by what was said by the court.

The next point which we consider relates to alleged error in permitting the plaintiff to show that the driver was discharged from Armour & Co.'s employment about a year after the runaway which caused the injury. This point is upon a different ground, because the evidence was admitted and allowed to stand.

In former times, under a rule existing in many jurisdictions, it was competent to show in personal injury cases that highways, sidewalks, and appliances upon railroads and in mills were immediately repaired upon knowledge of the injury. Such evidence was received as showing something in the nature of an admission by the town, city, or railroad alleged to be at fault. The old rule has been overthrown in many jurisdictions where it was formerly administered, and unquestionably does not exist in the federal courts; but, when trials were had under the old rule, proofs of repairs to be admissible must not be remote in point of time, and, in order to have any weight or probative force whatever with the jury, necessarily must have been closely related to the time of injury, because it stands to reason that nothing would be proven by way of admission to show that ice or snow was removed from the sidewalk a year after an injury by ice, or that a hole in a country road was repaired a year after an injury in question. This results because such conditions are necessarily and naturally subject to change of seasons, and it is therefore understood that it was necessary under the old rule to connect the situation at the time of the change with the situation at the time of the injury in order to make repairs or changes competent evidence as admissions of any weight whatever for the jury.

If the evidence as to the driver's discharge bore at all upon any question which the jury had to decide, it would be upon the ground that the discharge was in the nature of an admission that he was careless at the time of the accident. We are quite unable to see that a discharge from employment a year after this runaway could have

Digitized by Google

possibly influenced the jury one way or the other upon the question of care, or want of care, in respect to the accident in question. If the discharge had immediately followed the injury, it is possible that the jury might have been influenced by the inference that he was discharged because he was careless; but proof of the discharge a year afterwards, without in any way connecting it with the circumstances of the accident, could not, as we look at it, have influenced the jury in any substantial manner upon questions which it had to decide. A hundred things may have happened during the year to cause the discharge. It may have been that he was discharged because he was profane, or because he demanded more pay or less hours, or because he advised co-employés to demand more pay or less hours. It requires no greater stretch of imagination to connect the discharge with one of these things than it does to connect it with the accident. The conclusion therefore is that, while the admission of the evidence of discharge involved technical error, it was so immaterial and shadowy in respect to the questions of fact which the jury was to decide that it should be treated as harmless.

The doctrine of harmless error, which seems to be a growing one in the evolution of law, apparently does not offend the idea of a fair trial. A collateral thing, connected immediately with the time or thing in question, may sometimes be treated as not remote, and admitted as something having a tendency to show where the fact is; but, on the contrary, the same thing may be so remote in point of time or nature as to be wholly immaterial and inadmissible, because if admitted it would have no weight, and if excluded would do no harm, and under such circumstances, if its admission involves technical error, it may be treated as harmless. The whole theory, of course, is that the trial, under such circumstances, is a fair one, because the result, after all, is uninfluenced by the technical error with respect to a thing not having substance. If we were persuaded that harm had been done in this case, or if we had any substantial doubt upon the question, we should feel bound to direct a new trial; but, upon the whole, we cannot see that we have a substantial doubt. There was a long trial before a jury. The plaintiff called a witness who saw a team, which it is true she did not identify as Armour's team, but one which she described as "a yellow team with black marks on it, black letters"; a gray horse and yellow wagon. The witness further testified that she saw it drive up Felton and Williams streets; and that she saw the driver throw the reins over the horse's back and go into a saloon, leaving the horse unfastened. It was not so much a question of identifying the man as the team. The substantive weight of the evidence came from the fact that she saw a driver, not a particular driver, and that the driver left the horse unfastened, and that, while the driver was in the saloon, the horse ran like a flash down Williams street. As we have already pointed out, it was not so material to identify the man as the team, with the gray horse and the yellow wagon with black letters, in a runaway down Williams street. Another witness, Addie M. Hagar, who heard a disturbance and went to the door recognized the large heavy team of Armour's in collision with the buggy in which the plaintiff was sitting, and in a few moments Mr. Cunningham,

Digitized by Google

the superintendent, was at the scene of the accident, and recognized the team as one belonging to Armour & Co. True, as argued, the witness who described what occurred, when the horse was left in the street unhitched, and what occurred as the horse started, did not recognize the driver at the trial, but she did describe the horse as gray, and the wagon as yellow with black marks and letters. It is also true that she could not see that Armour & Co.'s name was on the wagon, because she could not read, but the fact that she could not read made the question of identity through a description of the color of the horse and the wagon none the less reliable and effective, and, if her description did not fix the identity, it was easily open to attack. The train of circumstances unexplained—the gray horse and yellow wagon with black letters, at the curbstone, with the reins thrown over the back of the horse, the same witness or witnesses seeing the same team in a start from the curbstone in a runaway, and a team of the same description, seen by other witnesses, involved in a collision which caused the injury—makes the case a strong one for the plaintiff, and we do not think the technical error at all changed the result from what it would have been if the technical error had not been made. Therefore it would not seem to conserve justice to disturb the verdict. The chances are very decidedly in favor of the idea that, if a new trial was had, at the expense of time and money, the result would be the same.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

PUTNAM, Circuit Judge (dissenting). This case relates to two admittedly plain errors, unless cured as to one by the subsequent rulings of the court. Those errors were the result of evidence offered by the plaintiff below, whom we will hereafter call the plaintiff, admitted under circumstances we will explain in full, and persistently put in by her. The evidence erroneously admitted was put in by the plaintiff with so much persistency that it is plain that she regarded it as advantageous, and therefore as prejudicial to the defendant; and the only ground upon which a new trial can be refused is that the court is asked to be wiser than the plaintiff, and thus find that it is clear that the evidence offered was not prejudicial to the defendant, although the plaintiff evidently acted on an opinion to the contrary, and notwithstanding she knowingly and persistently led the court into the errors complained of, and therefore presumptively ought not to be excused from the results thereof. A judgment here for the plaintiff would be so seriously in avoidance of the absolute rules of law, and the practical application thereof, firmly fixed by the Supreme Court, and would also do so much injustice to the defendant, that we are compelled to dissent from the result which the court has reached.

This is an action at law in tort, in which Armour & Co. was the defendant in the Circuit Court. The verdict and judgment were for the plaintiff. There are several counts in the declaration, all alleging that the plaintiff was run down by the defendant's wagon or horse, and injured; but the case as made was that the defendant's horse was negligently left by its driver unfastened, and thereupon ran away, and came into collision with the wagon in which the plaintiff was

Digitized by Google

sitting, causing the injury. The negligence is not alleged to have been that of the corporation per se, but of its "servants and agents." No particular servant or agent was named, but the evidence showed that the defendant's team was in charge of its driver, one Macdonald. The injury occurred at Waltham, in Massachusetts, in May, 1900, while suit was brought on June 27, 1905, more than five years after the accident, and the case was tried in March, 1906, nearly six years after it. The plaintiff is a lady 71 years of age, residing in Massachusetts, and the defendant is a corporation publicly known to be very wealthy, and against which a very considerable public impression has been created of late through the newspapers. In view of these facts, and especially in view of the long time between the event and the trial, there were special reasons why the jury should have been guarded against loose and improper inferences, and the case tried on the legitimate facts properly proven.

The plaintiff contended at the trial that the driver went into a saloon to get a drink of intoxicating liquor, and meanwhile left his horse unhitched, and the horse ran away. The case for the defendant was that the horse slipped on a cross-walk for some reason for which the defendant was not liable, and thereupon the horse, being frightened, ran away. The defendant was supported on this point by the testimony of the driver, Macdonald, and by that of one Halloran, who seems to have been an unchallenged witness, and who testified unqualifiedly that he saw the horse slip on a flat flagstone crossing, and fall, and that then, notwithstanding the driver's efforts to hold him, he got away from him. The barkeeper at the saloon where the driver was claimed to have gone for his drink testified that the driver was not there that day. Of course, this was negative testimony, while that of Halloran was positive. On the other hand, the only evidence in behalf of the plaintiff as to the origin of the accident was that of one Katrine Boudro, who testified that she saw the driver throw the reins over the horse's back and go into the saloon. She also testified that the horse started to run, and that some of the men came out of the saloon and ran after him; but, although she was cross-examined carefully on this point, she could not identify Macdonald in any way, even when he stood up in court in her presence. This was the entire proof in behalf of the plaintiff as to the way in which the accident originated. Under these circumstances, it is natural that the conclusion of the jury on the main issue, as to which the testimony could hardly be reconciled, was quite certain to be determined by the improper, though impressive testimony admitted into the case, first, that the driver Macdonald was afterwards discharged by the defendant, and, second, the proof of the statement of Cunningham, the defendant's local superintendent, that Armour & Co. was at fault.

The testimony of Macdonald to which we have referred was given by him when a witness for the defense. On cross-examination by plaintiff, he was asked whether he was then a drinking man. This was objected to by the defendant, but was admitted on the ground that it was preliminary to asking him whether he was a drinking man on the day of the accident. The answer was not insisted on, but the topic was pursued as follows:

Digitized by Google

"Q. Were you or not at that time a drinking man? A. Yes, sir.
"Q. Had you drank on the 2d day of May? A. No, sir.
"Q. You have been drinking now, haven't you?"
This was objected to by the defendant, but the court admitted it, and an exception was taken; and it was answered, "Yes, sir."

Mr. Cunningham, the local agent of the defendant corporation, was previously called as a witness by the plaintiff, who questioned him with reference to Macdonald's drinking. All this shows that the plaintiff deemed it for the interests of her case to maintain that Macdonald was a drinking man at the time of the accident, and ever so continued down to and including the trial, and that the plaintiff was persistent in bringing out facts establishing that line of proof. We shall refer to this again in connection with the precise exception by the defendant to certain other testimony to which this present line of examination was intended to lead the jury.

The case therefore turned on the question of the negligence of the driver, with the very important incidental issue with reference to his habits. Notwithstanding this, the plaintiff was permitted to prove by Cunningham, the local agent of the defendant at Waltham, where the accident happened, called as her witness, that Macdonald was discharged about a year or so after the accident. This was put in notwithstanding five distinct objections by the defendant, so that the plaintiff was acting with her eyes open, and under such circumstances that she ought to take the consequences of what she did. The bearing of this evidence was not explained by the court to the jury; neither was the fact that it was not to be regarded by the jury on the question of liability pointed out to them.

Very likely neither the court nor the plaintiff's counsel had in mind the change in the general practice to which we will hereafter refer, and they were therefore governed by the earlier practice in accordance with which such testimony was often admitted without question. On being interrogated at our bar, counsel for the plaintiff gave no reason for the introduction of the testimony, except that he understood that Macdonald, the driver, would be called by the defendant. If Macdonald had subsequently been called by the defendant, the plaintiff, of course, could have asked him, or any other witness, whether he was still in its employment, for the purpose of enabling the jury to give proper weight to his testimony, but she had no right to anticipate in this way the possibility of his being called; and it is plain that there was no reason whatever for bringing out the fact that he had been discharged, except for the purpose of influencing the jury on the issue of negligence, and the subordinate issue of the alleged habits of the defendant's driver, a topic which the plaintiff so persistently sought to bring to the attention of the jury.

On that issue, it is natural to suppose that the jury accepted the evidence as an admission on the part of the defendant that the driver was either negligent in this occurrence, or that his habits were continuously bad; and such an admission as to either would, in the natural course, have induced the jury to render a verdict against the defendant in the contradictory condition of the direct proofs, pro and con, to which we have referred.

Digitized by Google

It is suggested that the fact that the discharge was a year after the accident may have had effect in preventing the testimony from prejudicing the defendant. On the other hand, it seems to us that the impression which would be made on the minds of shrewd men on the jury would be the reverse, and would intensify prejudices, because, in one view, some of them would naturally reason that the driver had been kept for a year, until the probability of a suit was passed, and also the probability of the defendant's needing his testimony, and had then been discharged. But this suggestion is fully met by the persistency with which the plaintiff sought to bring out the alleged improper habits of Macdonald, both at the time of the injury and at the time of the trial, thus covering the intervening period, including the year during which he remained in the employment of the defendant. All this must have been intended to impress the jury that Macdonald's habits were continuously those of a drinking man. It may, perhaps, well be said that a test of his habits on the day of the injury, and the question of his leaving his horse on that day to go into a saloon for a drink of intoxicating liquor, could not properly have been exhibited to the jury in the reflected light of his subsequent continued habits, as sought to be proved by the plaintiff; but the plaintiff thought otherwise, and persistently conducted her case accordingly. There is nothing in the record showing that the court undertook to parry the effect of this testimony, or that the plaintiff, after persistently putting it in, did not work it for every advantage which she could possibly gain from it. It is difficult to conceive that, taking it all together, the jurors' minds did not probably carry the impression that Macdonald was discharged on account of persistent habits as a drinking man, if not in fact for his alleged carelessness on the day of the injury to the plaintiff, thus practically strengthening the presumption, in favor of the plaintiff's case, that his habits in that respect led him to neglect the team at the critical time.

Both the Supreme Court of the United States and the Supreme Judicial Court of Massachusetts have, for a very considerable time, practiced on the changed rule which we have stated, and, since this became recognized as the approved practice, no case can be found in either court involving questions of this character where, after a ruling admittting evidence of this kind, on a full objection and proper exceptions, a new trial has been refused. A marked case in the Supreme Court is Columbia Railroad Company v. Hawthorne, 144 U. S. 202, 207, 208, 12 Sup. Ct. 591, 36 L. Ed. 405, where a new trial was granted on this point alone; the opinion concluding as follows:

"As the incompetent evidence admitted against the defendant's exception bore upon one of the principal issues on trial, and tended to prejudice the jury against the defendant, and it cannot be known how much the jury were influenced by it, its admission requires that the judgment be reversed."

It will be noticed that this excerpt applies the settled rule of the Supreme Court to the effect that, where either party seeks and obtains a ruling which proves to be erroneous, the burden is on the party asking the ruling to establish the proposition that it could not have improperly influenced the verdict. The cases in the Supreme Court on this point are numerous, and it is hardly necessary to go

Digitized by Google

through them. It is sufficient to say that they are summed up in the opinion rendered in behalf of the Circuit Court of Appeals for the Sixth Circuit, in Inman Bros. v. Dudley Lumber Co., 146 Fed. 449, 455, 76 C. C. A. 659, 665, as follows:

"We have no right to speculate as to the prejudicial effect of a plain error. If its nonprejudicial effect is not so clear as to exclude every reasonable doubt, we should reverse."

If any one is curious to see how firmly the rule as thus stated by the Circuit Court of Appeals for the Sixth Circuit is embedded in the federal practice, a mass of authorities can be found in National Biscuit Co. v. Nolan, 138 Fed. 6, 9, 10, 70 C. C. A. 436, and the long list of cases there cited could be added if desired. It, perhaps, is well enough to quote from the opinion rendered in Vicksburg & Meridian Railroad v. O'Brien, 119 U. S. 99, 103, 7 Sup. Ct. 118, 30 L. Ed. 299, as follows:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal would be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party."

Whatever might be the result if the error was one of the court, without the solicitation of either party, the rule applies here, if necessary to resort to it; but this is not necessary, because we have shown that, in a case balanced as this one is, the jury should have been carefully guarded against any improper influences, and the natural inference is that this testimony weighed heavily with the jury in behalf of the plaintiff.

We have stated that the rule announced in the case of Columbia R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, is established in Massachusetts. We need cite only Hewitt v. Taunton Street Railway Company, 167 Mass. 483, 485, 486, 46 N. E. 106 which was in substance the same as the case at bar, only in one respect less favorable for the plaintiff, because, instead of proving directly that the motorman whose alleged negligence was in issue there had been actually dismissed by the defendant, the evidence objected to left on the jury only an impression, or an opportunity for an inference, that he had been "virtually discharged." For this reason alone the verdict was set aside, and a new trial granted.

The plaintiff claims, however, that there was no objection made to the question which brought out the answer to the effect that Macdonald had been discharged, so that no valid exception was taken. She says that the counsel for the defendant made no objection until after the question and answer were in, and then did not move to strike out, so that, therefore, it has no ground for exception; but the whole line of examination had been strenuously objected to, with exceptions noted. It was all brought out on re-examination by the plaintiff of one Cunningham, who was the local superintendent of the defendant, and who was called by her. The first question was as follows: "Is Mr. Macdonald in Armour's employ now?" Thereupon defendant's counsel said: "I object to that. It has no bearing on this case at all." This objection was sufficiently particular, even under

Digitized by Google

the federal practice. The court allowed an answer, and an exception was reserved. The answer was not definite enough. Then came the following question: "For what reason did he [Macdonald] leave your employ?" Defendant's counsel said: "I object to that. How can that possibly be binding on the defendant?" The court said that he might answer, and an exception was reserved. Then the witness responded: "He did not leave." Then came the question by the plaintiff: "What did he do? A. I discharged him." Then followed a renewal of the defendant's objection, and an exception was allowed; no objection being made at the time to the allowance of the exception. Ordinarily, this is a sufficient allowance of an exception without requiring the objecting party to move to have the testimony stricken out. However, the exception was in the most formal manner to the question as well as to the answer, because the whole line of examination and the question to which the final answer strictly responded, inquiring for what reason Macdonald left the defendant's employment, were properly and fully objected to, and an exception allowed. These were broad enough to cover the whole topic.

Under the circumstances, the evidence was prejudicial, and, even if not clearly so, it is not shown not to have been otherwise. It has been recognized, as we have seen, as of a class which alone is sufficient to require a new trial. It was objected to in various forms, and yet persistently called out by the plaintiff, and she should stand the consequences of her own persistent requirement in this direction. A new trial should be granted on account of this exception, if for no other reason.

The next question relates to the conversation with Cunningham already spoken of. It is plain that his position was not of that character which authorized him to bind the defendant corporation by a mere admission, and it is not now claimed that it was. Notwithstanding a long discussion between the counsel and the court, and notwithstanding that all objections were expressly reserved by the court, with the observation by it that the exceptions had been fully stated and all rights were saved, a witness called by the plaintiff was permitted to testify that Cunningham said a few moments after the accident that the colliding team was Armour's, and that Armour & Co. was liable.

This came into the case under the following circumstances: The plaintiff called a witness, Addie M. Hagar, who testified that the plaintiff lived with her at the time of the trial, and had lived with her for 10 years. Therefore we must assume that the plaintiff and her counsel knew fully what the witness would testify, so that any answer brought out by any general question to her must be assumed to have been deliberately sought, and not to have been brought into the case in a manner which surprised the plaintiff or her counsel, or which was not anticipated. She testified that she met Cunningham, apparently the first time, the day of the accident. She was permitted to testify that she had a conversation with him, which was, of course, properly admitted as preliminary. Then this question was put: "What did he say to you?" It is true that this was a general question; but, as we have already said, the plaintiff must be charged with knowledge of what the answer would be. It does not appear that either the court or the defendant had any

Digitized by Google

knowledge in reference thereto except as it was suggested, as we will show, in the discussion relative to the question which occupied, first and last, nearly four printed pages of the record.

The defendant immediately objected, on the ground that the subject-matter was "incompetent, irrelevant, and immaterial, and not a part of the res gestæ." Thereupon counsel for the plaintiff said: "We have been over all that, and your honor has ruled de bene that it was admissible." This going over, and the ruling de bene esse that was referred to, do not appear in the record; but this is of no consequence, because the whole matter was discussed in what does appear. Thereupon the court said: "I do not know what the witness says. I do not know whether it would have any bearing. I do not know what his relations were to the parties"—meaning by the word "his" Cunningham. The court repeated that he would allow the question de bene, and then added: "I shall try to properly instruct the jury as to its effect, that it must be connected before it shall have any effect, and that they shall not be prejudiced by any statement until it is connected." Thereupon the defendant made further objections, especially to the point that the testimony was allowed to go in before it was properly connected, in the following language:

"We make the further objection that it is not admissible at this time, because it tends to prejudice the jury if it should not be connected, and for the further reason that there is no connection shown between Cunningham and the accident, and no authority on his part to bind the defendant by any statement that he sees fit to make; and we object to it as being prejudicial to the defendant to offer it in evidence at this time without having been properly connected with them, as being highly prejudicial to the jury. Supposing this witness will testify that Cunningham ran up there and said: 'We are liable for this whole thing, we are at fault.' Now, we never can get that away from the minds of this jury, because they still have that with them. They will remember it, Cunningham's statement; and, if it is not lawful for that to be introduced in evidence, then it should not go to the jury at all. They should not have it under the guise of connecting it later on with some authority from Armour & Co. to make some such statement as that. Why is it not fair to the defendant, if they want to prove that, to show Cunningham's authority and relation with the company, show that first, and make it conditioned that they shall show that before they show any such statement? We are perfectly willing that this witness may be excused and called back, if they want to prove that."

Our observation as to this is that it appears from it that the defendant had some understanding of what the witness would probably include in her testimony, and most specifically objected to bringing that out; and that the defendant also clearly brought out the reasons why the court should not permit the evidence to go in unless it was first connected, and the manner in which the order of proof would prejudice the jury. In this respect the plaintiff clearly brought herself within the intimation in Clark v. Fredericks, 105 U. S. 4, 5, 26 L. Ed. 938, which we will refer to hereafter.

This was immediately followed by the plaintiff's counsel, as follows: "I do not see any objection to that, your honor." Just what he means by the word "that" is not clear. Then he continued:

"But it seems to me, under the assurances that I have given both to you and my brother Adams, that I shall show what Cunningham's connection with the matter was, whether or not he was an employé, and what his duties were,

Digitized by Google

by various witnesses—it seems to me that it is perfectly competent to let it go in now."

Then, after some conversation, the court asked the plaintiff's counsel: "Have you summoned Cunningham?" To which counsel replied: "No, I understood he was here in court." Then the court continued:

"You must conduct the testimony in your own way. I will allow you, if you desire to, not expressing my opinion as to what the better process would be in the order of testimony, but, if you desire, as a counsel in this court, to ask that question, saying that you intend to connect it in the proper way with the transaction, I will allow you to ask that question, and will allow the witness to answer."

Thereupon the defendant's counsel inquired as follows: "In order to make the record straight, may I renew my objection?" The court replied: "It may be regarded—I will state it fully that your objections are noted, and the rights of the defendant are saved." Then the exception was properly noted, and the question, "What did Cunningham say to the witness," was put. Defendant's counsel thereupon renewed his objection, and the court said: "That is renewed, and the exceptions are stated fully, and your rights are all saved." Then came in the objectionable testimony, and the defendant made a new motion to strike out; but the court still adhered to its ruling to permit the testimony de bene esse, and to afterwards instruct the jury that without further testimony it would have no effect as to liability. This was again excepted to, and the court replied: "I have only ruled so far de bene, that question and answer may not be stricken out."

This, therefore, went in under the positive assurance of plaintiff's counsel that he would properly connect Cunningham with the defendant corporation, which assurance was so far from being carried out that, so far as the record shows, not even any attempt was made in that direction. Under the circumstances, the court should have reverted to its caution to the plaintiff's counsel involved in the language which we have already given, namely, "saying that you intend to connect it in a proper way with the transaction," and should not have allowed the case to go to the jury, or, as it was allowed to go to the jury, the verdict should, in consequence of the broken pledge from the plaintiff's counsel to the court, have been set aside if for the plaintiff, and, in addition thereto, the plaintiff's counsel might well have received a reprimand for the manner in which this objectionable and prejudicial evidence got before the jury. Subsequently, at the close of all the testimony, and before the charge was given the jury, the defendant again moved to strike out the conversation with Cunningham "so far as he stated that Armour & Co. were responsible for the accident, and were liable." The court refused to strike it out, but it stated that it would charge the jury not to consider it. The court evidently thought that the interests of the defendant required that it should not strike out. Thereupon the defendant again reserved an exception. We do not note this motion, and the ruling and exception in reference thereto, except so far as it shows that the defendant never yielded its rights with reference to the admission of this conversation.

A suggestion was made in behalf of the plaintiff that, perhaps, this conversation might be regarded as a part of the res gestæ. Possibly it

Digitized by Google

was, so far as the mere ownership of the team was concerned; but this was not insisted on, and, as submitted to us, the only plausible answer to the exception is that the court finally instructed the jury to disregard the testimony so far as it bore on the question of liability. The statement as to liability was not only inadmissible (Vicksburg & Meridian Railroad v. O'Brien, 119 U. S. 99, 105, 7 Sup. Ct. 118, 30 L. Ed. 299; Union Insurance Company v. Smith, 124 U. S. 405, 423, 424, 8 Sup. Ct. 534, 31 L. Ed. 497) but it was of the gravest character so far as its influencing the jury was concerned, and it is difficult to believe that its effect was ever eradicated. It is true, as said in Hopt v. Utah, 120 U. S. 430, 438, 7 Sup. Ct. 614, 30 L. Ed. 708, and in Throckmorton v. Holt, 180 U. S. 552, at page 557, 21 Sup. Ct. 474, at page 476 (45 L. Ed. 663), that the general rule is that a direction of the presiding judge to the jury to disregard evidence improperly drawn out in the course of a trial cures the error; but it is also true, as further said, that there are instances where such a strong impression is made by such testimony that a subsequent withdrawal does not remove the effect caused by its admission.

Waldron v. Waldron, 156 U. S. 361, 15 Sup. Ct. 383, 39 L. Ed. 453, arose on an exception taken to argument of counsel. There the court directed the jury to disregard the improper expressions, and yet neither there, nor in Holt v. Throckmorton, was the verdict saved. In the case at bar, it is difficult to conceive that, in view of the peculiar conditions, the impression made on the mind of the jury was ever effaced. Here was, as we have shown, a case where it was very difficult for the ordinary jury to reconcile the conflicting testimony; yet the representative of the defendant was said to have made a statement which was, in fact, a verdict in favor of the plaintiff on the whole issue. Looking at the reasonable probabilities, this would be seized on by the jury in such a way that the jurors' minds were satisfied about it, and that satisfaction would not be impaired by anything that subsequently occurred.

After so strong an assurance as there was here that the testimony would be connected, in view of the fact that it was of such an impressive character that, presumably, it was impossible to eradicate the effect of its introduction, it would be a gross injustice not to allow the defendant clear and full relief. As well observed by the Supreme Court, in an illustrative way, in Dunlop v. United States, 165 U. S. 486, 498, 17 Sup. Ct. 375, 41 L. Ed. 799, slips are liable to occur in the heat of argument and otherwise in every trial, which must be regarded as such, and which, if remedied to the extent of the ability of the court and counsel, must be overlooked, or justice could rarely be done; but, in the case at bar, this testimony, as we have shown, was called out under such circumstances that the plaintiff is presumed to have known what it would be, and to have been seeking to draw it out deliberately. In addition to this, the testimony was ruled in after a discussion which occupies nearly three pages of the printed record, and after a positive assurance by the plaintiff's counsel that he would show what Cunningham's relation to the corporation was, an assurance which he did not follow up by even the slightest attempt to accomplish it. Therefore the whole was done deliberately.

Digitized by Google

It is true that it may be plausibly claimed that, as the court admitted it de bene esse, it was an incident of the right of the court to determine the method in which the testimony should be educed; that is, the order of proof. While this right is a general one, it is not without exceptions, as may be inferred from Clark v. Fredericks, 105 U. S. 4, 5, 26 L. Ed. 938, where it is said that a judgment will not be reversed because of an error in directing the order of testimony, "unless it clearly appears that the complaining party has been injured by what was done." Moreover, we think there can be no question that there was such prejudicial result in the present case, although the error may not have been strictly an error of the court, in view of the assurance of counsel for the plaintiff which was not made good, yet it stands in the same condition as the improper statements of counsel to the jury in Waldron v. Waldron, supra; so that, although, strictly speaking, the court itself may not have committed an error, yet there was prejudicial error in the trial from which the defendant ought not to suffer.

It is, however, insisted that Cunningham's statement covered the question of the ownership of the team, and that that portion of the statement relating to liability slipped in in such a way as is common with witnesses who do not quite appreciate what is admissible and what is not admissible; so that it would be unjust to deprive the plaintiff of her verdict on account thereof, in view of the caution given by the court to the jury. But it did not slip in, because, as we have shown, the relations of the plaintiff with the witness were so intimate that she is presumed to have known all that her witness would testify to, and the question was put broadly, "What did he say to you," and thus in such a way as to bring out whatever was in the plaintiff's mind. Moreover, as we have shown, plaintiff's counsel was cautioned against so sweeping a question by the suggestion made by defendant's counsel that the witness might testify that Cunningham said: "We are liable for the whole thing. We are at fault."

Moreover, there was no issue as to that portion of Cunningham's alleged statement which related to the ownership of the team, which was "that it was Armour's team that done it." This did not mean that it was Armour's team that was left by some driver who went into the drinking saloon, if there was any such team or any such driver, for Cunningham knew nothing about that; but it did mean only that it was Armour's team which came into collision with the plaintiff. On this there was no controversy, because the bill of exceptions commences with a statement as follows:

> "The defendant admits that its horse ran away on the date named, and that the wagon to which it was attached ran into, and collided with, the wagon in which Miss Skene was sitting, and threw her out upon the sidewalk; but denies any negligence on its part."

Apparently this is an agreed statement of the real issue, and the only issue, tried by the jury, and this apparent condition is fortified by the charge to the jury, in which the learned judge, in commenting on Cunningham's alleged statement, said that, "if he said what is alleged, it bears on the question only * * * whether it was their team, the defendant's team, which I understand them to have admitted." Moreover, in the long discussion with reference to the admission of the testi-

Digitized by Google

mony as to Cunningham's statement, there was no proposition or suggestion of any kind that the plaintiff offered it for the purpose of proving the identity of the colliding team, or had any need to use it therefor; and, subsequently, on the various motions of the defendant to strike out this testimony, there was no offer on the part of the plaintiff to limit it in any particular. There was, as we have already said, a question of the identity of the man who went into the drinking saloon, if any person went in there, and an examination of the witnesses which bore on this particular issue; but the record nowhere shows any question as to the identity of the team which collided with the plaintiff. On the other hand, what we have referred to leads to the just conclusion that there was no such issue. Therefore, in that respect, the error comes within the ruling of the court in Waldron v. Waldron, 156 U. S., already referred to, at page 384, of 156 U. S., at page 389 of 15 Sup. Ct. (39 L. Ed. 453), where it was said that it was true that the matter improperly put in by the counsel, which resulted in the new trial, related in one particular to a material issue; but, as that issue had been confessed by the pleadings, and was admitted in open court, it was wholly inadmissible. Under all the circumstances, it seems plain that this evidence was introduced for an improper purpose, and only for an improper purpose, so that the plaintiff should stand by the consequences of her act.

An exception was taken by the defendant to the admission of an ordinance of the city of Waltham imposing a penalty for allowing a horse to remain standing in the street, not in the care of some competent person, unless properly weighted or securely fastened. As we understand the case, this was admitted merely on the question of negligence, and, as we understand the common practice in Massachusetts, ordinances of that character are admissible in evidence for the purpose named.

Forty-three errors are assigned, covering nearly 19 printed pages. Many of them relate to opinions of nonexperts and to expressions of pain, all of which were admissible in evidence, within the rules shown by Insurance Company v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Northern Railroad Company v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977; O'Neil v. Hanscom, 175 Mass. 313, 56 N. E. 587; McCoy v. Jordan, 184 Mass. 575, 69 N. E. 358; and other cases of the same character, some of which are grouped in Chase's Stephen's Evidence (2d Ed.) 141, 142. The other errors assigned, to which we have not referred, were not brought to our attention in such manner as to demand our investigation of the record with reference to them. For example, one was that the court refused to direct a verdict for the defendant, as to which all said to us was merely that this brought up "the whole question of the defendant's negligence, and the plaintiff's freedom from contributory negligence," without anything further in reference to it. In like manner, eight assigned errors are disposed of in the defendant's brief by a mere reference to the fact that they were assigned, with a claim that the jury should have been fully and clearly instructed in regard to the subject-matters thereof. Of course, such treatment of alleged errors not only fails to meet the rules of this court, but also to conform to any practice which would require attention from any appellate tribunal. We think, however, that we have disposed of everything which is likely to arise on a new trial, or to which, for any reason,

Digitized by Google

it is necessary to give particular consideration. We have called attention to the different methods of alleging negligence in the several counts of the declaration. On account thereof the defendant moved before trial that the plaintiff elect between the counts, which motion was denied, and the defendant excepted. Clearly, according to the settled rules of practice, this, under the circumstances, was within the discretion of the Circuit Court, and forms no basis for an application to us.

On the whole, notwithstanding the numerous alleged errors which do not demand attention, the writer of this dissenting opinion is of the firm conviction, for the reasons herein stated, that, by refusing the defendant a new trial, great injustice is done it, and the rules of law, as settled and applied by the Supreme Court, are violated.

NOTE.—The following is the opinion of Hale, District Judge, on defendant's motion for a new trial:

HALE, District Judge. In this case the only question requiring a written opinion of the court is upon the motion to set aside the verdict because the damages were excessive. The plaintiff was a woman 65 years old at the time of the injury. The trial of the cause was some six years after the injury. The jury found for the plaintiff, and awarded damages in the sum of $10,000. When the verdict was rendered, I was of the opinion that the damages awarded by the jury were excessive, and that, in the exercise of a sound, judicial discretion, it would be the duty of the court to reduce the verdict or set it aside. After a very careful study of the case, I am still of the same opinion. I am, on the whole, of the belief that the jury must have been influenced by partiality during the conduct of the cause, and have rendered a rather larger verdict than the evidence fairly sustains. It is just, however, to say that, in my opinion, the evidence warrants a substantial verdict for the plaintiff. Neither the plaintiff nor her counsel attempted, during the trial, to arouse prejudice or passion against the defendant, or to inflame the jury's mind by any undue or unauthorized appeal to them. The plaintiff, at the time of the trial, was over 70 years old. She told her story in a simple, straightforward, and evidently truthful manner. The evidence justified a substantial award for doctors' bills, care, and nursing during the six years from the time of the injury until the time of the trial, and a very considerable sum for the plaintiff's personal suffering, both physical and mental. In reference to her suffering, the plaintiff did not undertake to exaggerate or to appeal to prejudice or sympathy. She showed that she had suffered severely during the several weeks when she lay in bed; that she had suffered ever since from weakness; and, for a considerable part of the time, from dizziness, nausea, bleeding from the nose, and from constant apprehension and fear of the recurrence of fainting and dizzy spells. The evidence of the plaintiff's physicians tends to show that the injuries are permanent in their nature, and tends also to show that she will suffer during the remainder of her life, although she was in good health before the injury. It is fair to say, too, that the medical testimony is not of an exaggerated character.

I could see, at the time of the trial, that the very simplicity and directness of the plaintiff's manner of giving her testimony, and of the testimony itself, had a great effect upon the jury, and would be likely to win from them a very large verdict. I therefore instructed the jury that, if they came to a question of damages, it was their duty to exercise great care in that branch of the case. I went so far in my charge as to say to them that, while juries should be just in the estimation of damages, they were not permitted to be generous, and that juries more often than otherwise were accustomed to err in the direction of unreasonably high verdicts.

There were some things in the conduct of the case, on the defendant's part, that might tend to influence the jury in the direction of high damages. As a matter of fact, they did render a verdict for larger damages, I think, than can be warranted by the evidence; but the plaintiff is clearly entitled to a verdict

Digitized by Google

for a very considerable sum. She is entitled to a reasonable amount for what she has paid her physicians, and for reasonable bills for nursing and attendance during the six years. The large element of damages, however, is for her suffering. The peculiarity of the plaintiff's case in this regard is that she has shown six years of actual suffering, part of the time of a severe character; for this she should have compensation. The testimony of her physicians tends also to show that she will have some suffering in future during the expectation of her life; and for this she should recover something.

The great question in the case is: How much should be allowed to the plaintiff for her six years of suffering? Upon this question there has been very extended argument by the learned counsel in the cause, who have cited a very great number of cases where the question of excessive damages has been considered by the courts. Two cases exactly alike cannot, however, be found in judicial literature; and the whole matter must come to a question of judicial discretion. It is undoubtedly my duty in this case not to grant a new trial unconditionally, but only in the event that the plaintiff shall not file a remittitur. If the question of allowing a remittitur were a new question, the objection might be raised that a court cannot order a remittitur, without invading the province of the jury, so that the result would be a verdict of the court, and not of the jury; but the practice of federal courts makes it clear that the court may correct a verdict of the jury in respect to excessive damages, and is not limited to granting an unconditional new trial. This court in this circuit has lately, and many times, had to pass upon this question. The Supreme Court has fully considered it. In Blunt v. Little, 3 Mason, 102, Fed. Cas. No. 1,578, Mr. Justice Story, while admitting that the exercise of the discretion of the court to disturb the verdict of the jury was full of delicacy and difficulty, recognized it to be a duty to interfere when it clearly appeared that the jury had given damages that were excessive. See Arkansas Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642, 646, 6 Sup. Ct. 590, 29 L. Ed. 755; Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746; Daigneau v. Grand Trunk Ry. Co. (a recent opinion by Judge Brown) 153 Fed. 593.

While, in the exercise of a sound, judicial discretion, I cannot allow the verdict of $10,000 to stand, it is my duty to carefully review the testimony, and to allow plaintiff to retain as large a portion of this verdict as the evidence will, in my opinion, warrant. I am of the opinion that there is a reasonable basis in the testimony for a verdict of $6,500. If the verdict had been for that amount only, I should not have set it aside.

A new trial will be granted, upon the ground of excessive damages, unless, within 14 days, the plaintiff shall remit the sum of $3,500, and consent to judgment for the plaintiff for the sum of $6,500, and costs.

(153 Fed. 272.)

BROCK et al. v. FULLER LUMBER CO.

(Circuit Court of Appeals, First Circuit. February 12, 1907.)

No. 659.

1. WRIT OF ERROR—PROCESS—AMENDMENT.

A writ issued out of the federal court described plaintiff's citizenship, but omitted to state the citizenship of either of the three defendants. Defendants moved to dismiss for want of jurisdiction because of this omission, whereupon plaintiff asked leave to amend the writ by inserting after the description of the "plaintiffs" the words "citizens and residents of." This motion was allowed, all parties treating the word "plaintiffs" as intended for "defendants," after which defendants, who were represented by the same counsel, filed a special plea denying that one of them was a citizen of Massachusetts, which plea was heard and overruled. *Held*, that the error in the motion to amend was unsubstantial, and that plaintiff, as

Digitized by Google

defendant in error, was entitled to correct the record by substituting the word "defendants" for "plaintiffs."

2. JURY—RIGHT TO JURY TRIAL—WAIVER.

A written stipulation is not essential to a waiver of a jury to assess damages on a bond after default, under Rev. St. § 961 [U. S. Comp. St. 1901, p. 699], declaring that, when the sum for which judgment shall be rendered in such suit is uncertain, it shall, if either party request it, be assessed by a jury.

3. SAME—PROCEEDINGS—REQUEST FOR JURY—TIME.

Plaintiff sued on a contractor's bond to secure performance of a written contract. On the trial, defendants' attorney stated that defendants might be defaulted, but that he "would like to be heard on the question of damages," and immediately thereafter suggested that the case be sent to an auditor. This was agreed to, and, though a jury was then present, an auditor was appointed, and no request was made for a jury trial at any time during the term, nor until four months after default, and after defendants had learned that the auditor's report was unfavorable, when they applied for an assessment of damages by a jury, as authorized by Rev. St. § 961 [U. S. Comp. St. 1901, p. 699]. *Held*, that the finding of the Circuit Court that the request for a jury trial was too late should not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 163½, 164.

Right to trial by jury in federal court, see note to O'Connell v. Reed, 5 C. C. A. 603; Vany v. Peirce, 26 C. C. A. 528.]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Thomas Hunt (Gaston, Snow & Saltonstall, on the brief), for plaintiffs in error.

Charles F. Choate, Jr. (Frederick H. Nash and Choate, Hall & Stewart, on the brief), for defendant in error.

Before COLT, Circuit Judge, and BROWN and HALE, District Judges.

BROWN, District Judge. This is a writ of error to review the rulings of the Circuit Court in an action on a bond given to secure the performance of a written contract. The plaintiffs in error (defendants in the Circuit Court) contend that the Circuit Court erred (1) in denying their motion to dismiss for lack of jurisdiction, and (2) in denying their claim for a jury trial on the question of damages.

The writ properly described the plaintiff as the Fuller Lumber Company, a corporation duly organized under the laws of New Hampshire, and a citizen of New Hampshire, but omitted to state the citizenship of either of the three defendants. Upon this omission the defendants based a motion to dismiss for want of jurisdiction. The plaintiff then filed a motion to amend its writ. In this motion it asked that the writ be amended by inserting after the description of the "plaintiffs" the words "citizens and residents of." The use of the word "plaintiffs" was obviously a mere slip of the pen. The plaintiff was already properly described; and the use in the motion of the plural in "plaintiffs," and in "citizens and residents of," shows clearly that it was intended to amend, not as to the single plaintiff, whose citizenship was already properly alleged, but as to the several parties defendant. There is no

Digitized by Google

doubt that, in overruling the motion to dismiss, and in granting the motion to amend, it was assumed by the court that the amendment related to the parties defendant. This slip of the pen apparently was noticed neither by the court nor by counsel on either side. The defendants were all represented by the same counsel, who, upon the overruling of the motion to dismiss and the granting of the motion to amend, filed a special plea in behalf of one of the defendants denying that he was a citizen of Massachusetts, which plea was heard and overruled. The error is so obvious, and it is so clear that the error was overlooked by every one in the Circuit Court, that we cannot regard this point as substantial. The motion of the defendant in error to correct the record by inserting, instead of the word "plaintiffs," the word "defendants," is granted.

The principal question in the case is whether the Circuit Court erred in denying a jury trial upon the question of damages. The bill of exceptions states the facts as follows:

"The defendants filed, by way of answer, a general denial. The case was then placed upon the list of actions for trial by jury. When the case was called for trial before Aldrich, J., counsel for plaintiff arose and said he was ready for trial. Counsel for defendant stated to the court that as far as the liability in the case was concerned he would agree that the defendant might be defaulted, but that he would like to be heard on the question of damages. The defendants were thereupon defaulted.

"Immediately afterwards, counsel for defendant addressed the court on this question, and suggested to the court that this case appealed to him as a proper case to send to an auditor. The court then said that he thought it was a proper case for an auditor, and asked counsel to agree upon an auditor."

Subsequently there was filed the following agreement, signed by counsel for both parties:

"It is agreed that Irving McD. Garfield, of Boston, may be appointed auditor in this cause."

A rule to auditor was entered December 1, 1904, in the following terms:

"And now, to wit, December 1, 1904, by agreement of parties, it is ordered by the court that Irving McD. Garfield, Esq., be and hereby is appointed auditor in the above-named action, to hear the parties and examine their vouchers and evidence and to state the accounts and make report thereof to the court."

The case was heard only upon the question of damages by the auditor, who, on March 24, 1905, filed his report. March 29, 1905, a motion was filed by the plaintiff that the report be confirmed, and that execution issue for the penal sum named in the bond. March 30, 1905, the defendants claimed in writing a trial by jury upon the question of damages. March 31, 1905, the defendants moved to recommit the report of the auditor for errors of law. April 15, 1905, the defendants filed exceptions to the report of the auditor, and on the same day filed the following motion for trial by a jury:

"And now come the defendants in the above-entitled action and move and request that the sum for which judgment shall be rendered herein be assessed by a jury in accordance with the provisions of section 961 of the Revised Statutes [U. S. Comp. St. 1901, p. 699]."

Digitized by Google

The case was heard by the court upon exceptions to the auditor's report, and the motion for trial by jury. The motion for a jury trial was denied, and exception duly taken. March, 28, 1906, judgment was entered for the plaintiff for the penal sum named in the bond.

The plaintiffs in error base their claim to a jury trial upon section 961 of the Revised Statutes [U. S. Comp. St. 1901, p. 699]:

"In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury."

Upon the default of the defendants, it became the duty of the court to render judgment for so much as was due according to equity. Juries were then sitting, but the defendants did not request a jury trial. In Aurora City v. West, 7 Wall. 82, 104, 19 L. Ed. 42, it is said:

"But if the sum for which judgment should be rendered is certain, as where the suit is upon a bill of exchange or promissory note, the computation may be made by the court, or, what is more usual, by the clerk; and the same course may be pursued even when the sum for which judgment should be rendered is uncertain, if neither party request the court to call a jury for that purpose. Common-law rules were substantially the same, except that 'the court themselves might, in a large class of cases, if they pleased, assess the damages, and thereupon give final judgment.'"

The defendants' request for an auditor was not preceded by a request for a jury trial. The case stood for trial by the court on the question of damages, unless affirmative action should be taken by the defendants to procure a jury trial. The defendants' counsel did not state that the auditor was desired to prepare the case for jury trial. We think that the court was entitled to assume that the appointment of an auditor was requested, and was agreed upon simply as a convenient step in the assessment of damages by the court. The statement of defendants' counsel, "that he would like to be heard on the question of damages," certainly conveyed no indication of a desire for a jury trial. On the contrary, we think it might well have been understood by the court to indicate a desire to be heard by the court.

It is contended by the plaintiffs in error that the right to a jury trial upon the question of liability, by express provision of Rev. St. §§ 648, 649 [U. S. Comp. St. 1901, p. 525], can be waived only by stipulation in writing; and that there is no possible reason why the rule as to the question of damages should be different. This is contrary to the decision of the Supreme Court in Kearney v. Case, 12 Wall. 275, 20 L. Ed. 395, in which it was held that parties may waive a jury trial without filing a written stipulation, and by implied consent, though in such case no error can be considered in the action of the court on such trial. It was said (page 283 of 12 Wall. [20 L. Ed. 395]):

"In those courts where juries are called from a great distance and detained at a heavy sacrifice, the courts usually give jury trials the preference. The benefit, therefore, of an announcement by which the number of these trials is diminished and the case placed in an attitude to be taken up at the conven-

Digitized by Google

lence of the court and the parties is obvious. We cannot believe that Congress intended to say that the parties shall not, as heretofore, submit their cases to the court unless they do so by a written stipulation, but that it was the intention to enact that if parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must first file their written stipulation," etc.

The case stood for trial by a jury upon the question of damages, as well as upon the question of liability. The defendants, previous to the date fixed for trial, had taken no steps to procure an auditor for the purposes of a jury trial. Had a request been made to take the case from the jury, or for a continuance, on the ground that the case was of such a nature as to require the services of an auditor to put it in shape for a jury trial, the court might well have refused such a request on the ground that it had not been made seasonably. Had the plaintiff been informed that it was then the intention of the defendants to claim a jury trial on the question of damages, it might well have resisted the motion for the appointment of an auditor, and have insisted that, if a jury trial was to be had, it should be before the jury then present for the trial of the case which the plaintiff was ready to try. As a practical matter, we think that if the defendants desired both a hearing before an auditor and a trial before a jury on the question of damages they should have stated that desire seasonably; and that, failing to state that desire, and, on the contrary, stating merely a desire to be heard, both the court and opposing counsel were entitled to assume that the request for an auditor was made by the defendants not to prepare for a jury trial, but to prepare the case in the most convenient way for its disposal by the court.

Counsel for the plaintiffs in error contends that a reference to an auditor contemplates a regular trial in the future. We think that this may be conceded; also that his report is only prima facie evidence to be used upon a subsequent trial before the court or jury. Stone v. Sargent, 129 Mass. 503, 512. He relies, also, upon Fenno v. Primrose, 119 Fed. 801, 56 C. C. A. 313, a decision of this court, to support the proposition that an auditor is an officer appointed to prepare the case for a jury. He argues, therefore, that a reference to an auditor cannot be inconsistent with or a substitute for a jury trial. The case of Fenno v. Primrose did not decide, however, that an auditor can be appointed only for the purpose of preparing a case for a jury trial. Reference to an auditor may serve the convenience of counsel, and may be regarded by counsel quite as desirable when the case is ultimately to be decided by the court as when it is ultimately to be decided by a jury. As certain kinds of questions can be more conveniently tried to the court than to a jury, so certain questions may be more conveniently tried before an auditor than before the court. Counsel familiar with the practice in equity before a master, whereby the evidence may be fully prepared for final hearing by the court, may desire to secure in a law trial the same advantage. We are of the opinion that the request for an auditor cannot be regarded as in any way indicating a desire for a jury trial.

It was not until after the plaintiffs in error were apprised of the auditor's findings, and not until after a motion had been made for a

Digitized by Google

confirmation of the auditor's report and for the issue of execution, that they indicated any desire for a jury trial. Default was made November 28, 1904. Four months elapsed before the making of a claim for a jury trial. Had the auditor's report been satisfactory to the defendants, we think they might well have contended that a claim at that time by the plaintiff for a jury trial would have been too late, and we think that no act of the defendants which preceded their claim for a jury trial gave them any greater right than the plaintiff. The default was at the November term, 1904. No claim for a jury trial was made during that term. It is well settled, as we have seen, that parties may waive a jury trial without stipulation in writing by submitting the case to the court for hearing, even when the right to a jury trial is secured to them by statute without affirmative request. In this case the defendants' right to a jury trial was conditional upon their expressly claiming it. Where a party suffers a case to stand for the assessment of damages by the court for so long a period as four months, during which the court has taken steps towards the assessment of damages, we think it is within the discretion of the trial court to decide that the request for a jury trial is too late.

Though the statute itself fixes no limit of time within which a request for a jury trial must be made under section 961, it does not follow that the time is unlimited. In Re Grant (D. C.) 143 Fed. 661, it was held that the right of review or appeal for which the statute fixes no time limit is, nevertheless, not unlimited, but requires of a person seeking a review the duty of proceeding with some degree of diligence, and the failure to so proceed must be construed as an abandonment of the appeal. We do not decide, of course, that a request for an auditor is in itself a waiver of jury trial; nor do we decide that the mere failure to request a jury trial before asking for an auditor is necessarily a waiver of jury trial, for it is undoubtedly true that the appointment of an auditor is in itself not more suggestive of the final assessment of damages by the court than by the jury. But we do decide that the request for a jury trial under section 961 must be made seasonably, and cannot be delayed indefinitely, and that parties should not be permitted by their action to make a practical abandonment of a claim for a jury trial, and, after an unfavorable result before an auditor, base a request for a jury trial upon an afterthought. The learned judge who heard the case in the Circuit Court found that a jury trial had not been seasonably requested. He had before him all the facts as shown by the record, among them the following: The case came on for a jury trial without any previous request by the defendants for an auditor to prepare for that trial; the jury was present for the trial of the question of damages as well as that of liability, yet no request was then made for a jury trial; the request for an auditor was preceded by no intimation that a jury trial was desired, or that the auditor was desired to prepare the case for a jury, counsel stating merely that he "would like to be heard on the question of damages"; no request was made for a jury trial at any time during the term at which default was made, nor until four months after dedefault, and after the defendants had learned that the auditor's report was unfavorable and had cause to be apprehensive that judgment

Digitized by Google

might speedily follow against them. Considering all the circumstances shown by the record, we are of the opinion that it cannot be said that the finding that a jury trial was not seasonably requested was erroneous.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

(153 Fed. 278.)

COLE et al. v. CARSON.*

(Circuit Court of Appeals, Eighth Circuit. April 17, 1907.)

No. 2,450.

COURTS—FEDERAL COURTS—ADOPTION OF STATE PRACTICE—PLEADING—JURISDICTION—DIVERSITY OF CITIZENSHIP—DENIAL BY ANSWER.

Rev. St. Mo. 1899, § 596 [Ann. St. 1906, p. 622], provides that the only plea on the part of the defendant is a demurrer or answer. Section 604 declares that the answer shall contain, first, a general or special denial; and second, a statement of any new matter constituting a defense or counterclaim. Section 605 authorizes a defendant to set forth, by answer, as many defenses and counterclaims as he may have. *Held*, that since the enactment of the conformity act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), it is not necessary for a defendant in a suit in a federal court sitting in Missouri to raise the question of jurisdiction by plea in abatement, but that an answer containing a general denial, etc., was effective to put in issue the allegations of diverse citizenship.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 921.

Conformity of practice in common law actions to that of state courts, see note to O'Connell v. Reed, 5 C. C. A. 594; Mederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

In Error to the Circuit Court of the United States for the Southwestern Division of the District of Missouri.

M. R. Lively and W. R. Robertson, for plaintiffs in error.

Hiram W. Currey and George V. Farris, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. The trustee in bankruptcy of the Missouri Development Company, incorporated under the laws of the state of Indiana, brought his action in the court below against the defendants, charging them with the conversion of certain property belonging to the bankrupt. It was alleged in the petition that the trustee and the bankrupt were citizens of the state of Indiana and that the defendants were citizens of the state of Missouri. The latter appeared to the action and filed an answer, denying each and every allegation of the petition, and pleaded some affirmative defenses. The case was tried to a jury resulting in a verdict for plaintiff. Many errors were assigned by the defendants, who are prosecuting this writ of error; but in the view we take of the question of jurisdiction these need not be considered. Although issue was joined on the allegation of diversity of citizenship of the parties, no proof was produced tending to establish the affirmative of the issue so tendered, and defendants now urge the want of such proof as ground for reversal of the judgment.

*Rehearing denied June 11, 1907.

Digitized by Google

Prior to the enactment of the act of June, 1872 (Rev. St. § 914, [U. S. Comp. St. 1901, p. 684]), known as the "Conformity Act," if the requisite citizenship of the parties was properly alleged in the petition, it was deemed admitted by pleading to the merits without having first filed a plea in abatement denying it. Sheppard v. Graves, 14 How. 505, 14 L. Ed. 518; Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579. But since the assimilation of the practice in the national courts to that in the state courts by the conformity act, in those states where the answer takes the place of all pleas at common law, and where it must contain a general or specific denial of each material allegation of the petition controverted by the defendant, the common-law requirement of pleading matters in abatement of the action before taking issue on the merits has become obsolete, and a denial in the answer of all the allegations of the petition puts each and all of them in issue, whether they be matters in abatement or bar. Roberts v. Lewis, supra. Yocum v. Parker, 66 C. C. A. 80, 130 Fed. 770; Roberts v. Langenbach, 56 C. C. A. 253, 119 Fed. 349.

The determination of the question now under consideration, therefore, depends upon whether the Code of Missouri, whence this case came, requires matters of abatement to be pleaded as a part of an answer to the merits, or whether the rule of the common law on the subject is applicable to them. The Code provides that "the only plea on the part of the defendant is either a demurrer or an answer" (section 596, Rev. St. Mo. 1899 [Ann. St. 1906, p. 622]); that "the answer of the defendant shall contain first a general or special denial of each material allegation of the petition controverted by the defendant or any knowledge or information thereof sufficient to form a belief; second, a statement of any new matter constituting a defense or counter-claim in ordinary and concise language and without repetition" (section 604, supra); that "the defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both" (section 605, supra). The foregoing provisions of the Missouri Code, in our opinion, clearly indicate that everything constituting a defense to an action, whether in abatement or to the merits, must, unless the defect appears on the face of the petition, be presented in an answer, which is the only pleading other than a demurrer, recognized by the statute.

But it is contended that the Supreme Court of Missouri has held otherwise, and our attention is called to the following cases: Northrup v. Mississippi Valley Ins. Co., 47 Mo. 435, 4 Am. Rep. 337; Rippstein v. St. Louis Mut. Life Ins. Co., 57 Mo. 86; Rogers v. Marsh, 73 Mo. 64; Baier v. Berberich, 85 Mo. 50; Paddock v. Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254, and others in support of that contention. These have been critically examined, and, while in some of them, noticeably the Rippstein Case, countenance is given to plaintiff's view, others are disposed of on the ground that certain specific objections not apparent on the face of the petition must be taken by answer or be held waived.

Digitized by Google

But whatever sanction may have been given to that contention in the Rippstein and other cases appears to have been distinctly repudiated in Little v. Harrington, 71 Mo. 390, wherein the Supreme Court, by Chief Justice Sherwood, considered the question, and after adverting to the statutory provisions supra says as follows:

"It is evident from these statutory provisions that only one answer is contemplated, and this to contain whatever defense or defenses the defendant may have, thus dispensing with the common-law rule that a plea in bar waives all dilatory pleas, or pleas not going to the merits. * * * Matter in abatement is as much a defense to the pending actions as matter in bar, and to say that the defendant may reserve the latter until a trial shall have been had upon the issues, in regard to the former would interpolate what is not in the statute; would be inconsistent with its plain and simple requirements."

To the same effect are Byler v. Jones, 79 Mo. 261; Young Men's Christian Association v. Dubach, 82 Mo. 475; Cohn v. Lehman, 93 Mo. 574, 6 S. W. 267; State ex inf. v. Vallins, 140 Mo. 523, 41 S. W. 887.

In the last-mentioned case, which was an information in the nature of quo warranto, the following language is employed:

"The assertion is made by counsel for respondents, in substance, that inasmuch as proceedings in quo warranto are governed here by the common law that, in consequence of this, it was not admissible to plead at the same time to the jurisdiction and also to the merits, and the intimation is given that there are other matters yet held in reserve and to be brought forward in resistance to the information. On this it is enough to say that, although the present proceeding is in effect as it was at common law, yet at the same time it is but a civil action, as we have often declared, and, being such, there is but one answer allowable in such cases, and that must contain all the defenses the party has, no matter what their nature, whether in abatement or in bar."

From the foregoing there can be no doubt as to the present attitude of the Supreme Court of Missouri on the question under consideration, whatever it may have originally been. The statutes so construed by that court are substantially the same as provisions found in the Code of Civil Procedure of Nebraska, which were under consideration by the Supreme Court in Roberts v. Lewis, supra. Mr. Justice Gray, in delivering the opinion in that case, makes use of the following language:

"The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, and, like other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff. The record showing no proof or finding upon this essential point, on which the jurisdiction of the circuit court depended, the judgment must be reversed, with costs for want of jurisdiction," etc.

This court in Yocum v. Parker, supra, had under consideration the question we are now considering, and reached the conclusion which we now reach. We might well have disposed of the present case by reversing it on the authority of that one; but, as counsel have earnestly argued the question anew in the light of Missouri statutes and authorities, we have carefully considered it again with the result indicated. Our attention is called to Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801, and Every Evening Printing Co. v. Butler, 144 Fed.

Digitized by Google

916, 75 C. C. A. 657, and cases therein cited, as authority against the conclusion now reached, but on examination they are not found to raise the question now before us as to the effect of code pleadings.

The judgment will be reversed, and the cause remanded to the Circuit Court, with directions to dismiss it unless by some appropriate proceeding jurisdiction is made to appear. It is so ordered.

(153 Fed. 281.)

In re WYLIE et al.

(Circuit Court of Appeals, Third Circuit. April 29, 1907.)

No. 19.

BANKRUPTCY—RESALE OF PROPERTY—RIGHTS OF PURCHASER.

A sale of property by a trustee in bankruptcy was set aside by an order directing a resale of the property "free and discharged of and from all incumbrances," and requiring the petitioner to give security to bid an advanced price offered, and, in addition, such sum as might be awarded to the prior purchaser. Pending an appeal from such order the court vacated a prior order staying execution on a decree of foreclosure previously entered in a state court, but requiring the petitioner, with its consent, to make a similar bid at the foreclosure sale. It became the purchaser at such sale at a price largely in excess of that which it had undertaken to bid. *Held*, that it was entitled to the property free of incumbrance, the same as though the sale had been made by the bankruptcy court; and that the amount awarded to the former purchaser, and the costs in connection therewith, as well as the accumulated taxes on the property, should be paid by the trustees from the proceeds of the sale.

Appeal from the District Court of the United States for the District of New Jersey.

Robert Adrain, for appellants.
George S. Silzer, for Joseph Allgair.
J. Hill Brinton, for Sayre & Fisher Co.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. When this matter was before us upon the petition of Joseph Allgair for annulment of an order of the District Court, dated July 24, 1905, setting aside a sale of the property of the bankrupt which had been made by the trustees to said Allgair, that order was affirmed, with direction for further proceedings in connection therewith; and if, in pursuance thereof, the trustees in bankruptcy had again sold the property, the questions now presented by their petition for revision could hardly have arisen. Allgair v. William F. Fisher & Co., 143 Fed. 962, 75 C. C. A. 148. The taxes in dispute would unquestionably have been for payment by the trustees; and it is quite clear, we think, that the sum to be paid to Allgair, and the costs incurred in determining its amount, would have been payable from the proceeds of the required bid of "not less than the sum of $60,000, and, in addition thereto, such sum" as might be awarded to Allgair.

But shortly after the making of the order of July 24, 1905, Joseph Allgair appeared in the District Court and (as explained by the learned judge of that court) "offered to place the property in the

Digitized by Google

possession of the bankrupt's trustees, on terms not necessary now to be stated, to be held by the trustees pending the appeal, which offer was accepted. There were at that time two mortgage incumbrances upon the bankrupt's property—the first for $24,000, with accrued interest, and the second, which had been foreclosed in the New Jersey court of chancery, and merged into a final decree, for something over $15,000. Sale under the execution issued upon this decree had long been stayed by this [the District] court. Feeling that the stay ought not to be continued during the pendency of the appeal above mentioned, an order vacating the stay was signed on August 14, 1905. As the making of this order rendered it possible for the complainant in the foreclosure case to sell the property under the execution issued in that case, and thereby defeat the purpose of the order of July 24, 1905, which was to secure a sale of the property for a larger sum than $55,000, another order, dated back to July 31, 1905, the terms of which were agreed to by the Sayre & Fisher Company, was made." The provisions of this latter order are sufficiently set forth in the opinion of the District Court, and need not be repeated. In re William F. Fisher & Co. (D. C.) 148 Fed. 907. Of its general purpose, and that of the agreement respecting it, we have no doubt. The manifest intention was to permit a sale under the foreclosure proceedings, at which the Sayre & Fisher Company was to bid in substantial accordance with the agreement it had made when a resale by the trustees was contemplated. Accordingly the foreclosure sale did take place, and, as was anticipated, the Sayre & Fisher Company became the purchaser. It paid for the property a larger sum than it had undertaken to pay, and the bankrupt's creditors have been correspondingly benefited. Its obligation to bid at least $60,000, and, in addition thereto, the sum due to Allgair was fully discharged, and, except by so bidding, it had not agreed to provide in any way for the Allgair claim, or to bear any costs in connection with it. So, too, as to the taxes. There was no agreement by the Sayre & Fisher Company to pay them, and the foreclosure sale, in its relation to the bankruptcy proceedings, was but a substitute for the resale which the order of July 24, 1905, had directed the trustees to make. Therefore, though the order of July 31, 1905, was silent on the subject, we think that the Sayre & Fisher Company, having redundantly performed its undertaking to bid, had a right to assume that, if it became the purchaser, it would take the property, as the order of July 24, 1905, had provided, "free and discharged of and from all incumbrances."

The order to which this petition for review relates is affirmed.

Digitized by Google

(153 Fed. 337.)

FREEMAN et al. v. FREEMAN.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1907.)

No. 2,442.

1. TRUSTS—ESTABLISHING BY PAROL—KANSAS STATUTE.

Gen. St. Kansas 1901, § 7875, which provides that no trust concerning lands, except such as arises by implication of law, shall be created, unless in writing, etc., does not prevent a complainant from showing by parol that real estate conveyed to defendant was in part paid for by others, together with other tracts, and that the conveyance was pursuant to an agreement made in good faith between the purchasers that defendant should hold the same in trust for the benefit of the one to whom it should be allotted in a division; the trust in such case being one arising by implication of law under sections 7880 and 7882 of the statute as construed by the Supreme Court of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 62-65.

Construction of statute—State laws as rules of decision in federal courts, see note to Wilson v. Perrin, 11 C. C. A. 71.]

2. SAME—EVIDENCE ESTABLISHING—IMPLIED TRUST.

In a suit by heirs to recover a lot, the title to which was alleged to be held in trust by defendant for the benefit of their decedent, it was shown that he and his family, consisting of his parents, two brothers, and a sister, the defendant, from time to time during a number of years had purchased lots and other real estate with the intention of holding the same in partnership until a division was made. All contributed to the payment of the purchase money, except perhaps the defendant, and toward paying off incumbrances. The title to all of the property was vested in the father and in defendant, who was unmarried and lived with her parents. The father, having reached an advanced age, conveyed the property standing in his name, including the lot in controversy, to defendant, as the evidence tended to show, on an agreement and understanding that she should hold the same in trust for the benefit of all until a division should be made. This deed was not recorded, but was known to the others. The sons having removed to a distance, defendant looked after the property and received and applied the remittances made by her brothers. After some correspondence respecting a division, she caused a deed to be executed to the decedent by her parents, conveying to him the lot in controversy, subject to a life estate in the grantors, which deed the decedent accepted as satisfactory. A few days afterward, and before his deed was recorded, he was killed, and defendant thereupon recorded her prior deed and claimed the property. *Held*, that such evidence, including the corroborative facts which were undisputed, was sufficient to raise an implied trust which entitled complainants to a conveyance of the lot from defendant, subject only to a life interest in her parents.

Appeal from the Circuit Court of the United States for the District of Kansas.

Rush C. Butler (Eldon J. Cassoday, O. J. Wood, and Alfred A. Scott, on the brief), for appellants.

Joseph G. Waters (A. H. Case, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This was a suit by the widow and children of John E. Freeman, deceased, against Harriet E. Freeman, to establish a trust and to compel a conveyance of a lot in Topeka, Kan. Upon final hearing the trial court dismissed complainants' bill, and they have appealed.

Digitized by Google

John E. Freeman and the defendant Harriet were brother and sister. The defendant's title, which was sought to be charged with the trust, came to her by warranty deed from her parents. The theory of the trial court in dismissing the bill was that complainants were seeking to establish an express trust in real property by parol evidence contrary to the provision of the Kansas statute (Gen. St. 1901, § 7875) that:

"No trust concerning lands except such as may arise by implication of law shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto lawfully authorized in writing."

The case of Gee v. Thrailkill, 45 Kan. 173, 25 Pac. 588, was cited and applied. In that case Thrailkill conveyed real property to Mrs. Gee by absolute and unconditional warranty deed, and afterwards sought to show by parol evidence that the agreement at the time was that Mrs. Gee might sell or mortgage it to raise funds for him, and that whenever he so desired she should reconvey to him any part remaining in her hands. It was held that Thrailkill was endeavoring to establish an express trust by parol, and that the case was therefore within the statute.

This appeal presents three lines of inquiry: What trusts in respect of realty in Kansas are not controlled by the above section of the statute? What was the case stated in the bill of complaint? What was established by the proofs? Of these in their order:

Other sections of the Kansas statute (sections 7880, 7882) provide that when a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter, but that this provision shall not apply where it shall be made to appear that by agreement and without any fraudulent intent the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase money, or some part thereof. It will also be observed that the section of the statute applied by the trial court expressly excepts from its operation such trusts as arise by implication of law.

Rayl v. Rayl, 58 Kan. 585, 50 Pac. 501. In this case a farm consisting of a half section of land was purchased, and the deed taken in the name of Elijah Rayl, under an agreement that he should hold the title for his mother, himself, and a minor brother; that he and the brother were to manage the farm as partners; that the mother and the other minor children were to aid in operating and in paying for the farm and at the end of five years a designated quarter section should be conveyed to her. The mother and a daughter attended to the housework, and all the family and the farm hands boarded with her. Other members of the family helped in raising crops. The mother earned some money in weaving carpets and in keeping boarders. The results of her labors and of those whose services she was entitled to went to the payment of the land, and her contributions exceeded in value the purchase price of the part she was to have. When the time came for Elijah to convey he refused, and in defending her suit contended that she was endeavoring to enforce an express trust resting in parol. The Supreme Court

Digitized by Google

of Kansas held, however, that a trust arose by implication of law which could be established by parol evidence and enforced under the exceptions in the Kansas statutes.

Franklin v. Colley, 10 Kan. 260. In this case two women jointly purchased two lots; each furnishing an equal part of the consideration. But by agreement, and without any fraudulent intent, they had the deed made to one; she to hold the title until the other became of age. They jointly improved the property, and afterwards the one who held the title repudiated the right of the other. In a suit to establish the trust and to compel a conveyance, the court held that there was a resulting trust which might be shown by parol evidence, and that the statutes were not intended "as limitation, restriction, or prohibition upon the creation of what are known as resulting trusts, implied trusts or constructive trusts." It is also well settled in Kansas that when the legal title to real property has been acquired, and is being held wrongfully and in fraud of the rights of the equitable owner, a constructive or involuntary trust arises and may be established by parol evidence. Typical cases of trusts of this character are Howard v. Howard, 52 Kan. 469, 34 Pac. 1114, and Rose v. Hayden, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145.

Was the bill of complaint framed upon the theory of an express trust, or did it charge a trust arising by implication of law? If the former was intended, it must be said that the existence of the essential writings would have to be inferred, as the pleader made no mention of them in the bill of complaint. On the other hand, the voluminous averments of the circumstances surrounding the acquisition of the legal title by the defendant, the relations between the parties, and the contributions of moneys by complainants' intestate, show that the intention was to exhibit such a state of facts as would give rise to a resulting or constructive trust, as distinguished from one created by written agreement. While the averments of the bill are somewhat lacking in precision and definiteness in this particular, we are of the opinion that they are sufficient. The following appears to be quite clearly charged: Before the conveyance of the lot in controversy to the defendant, her father held the legal title to it, and also the legal title to other lands and property. During his lifetime he and his three children, John E. Freeman, the defendant Harriet, and a son Elijah, had purchased several tracts of land, and the title was taken in the name of the father for the benefit of all of them. Each of them contributed to the purchase price. John E. Freeman, the complainants' intestate, sent from time to time to the father and to defendant Harriet, who was managing the father's business affairs, large sums of money to be applied in the payment of certain notes, some of which were secured by mortgage upon the property held in the name of the father for the benefit of all of them, and those sums of money were so applied. Prior to the death of the father a division of the property so acquired and held was agreed upon by the parties in interest. Each one was to receive certain specific parcels. Under this agreement for division John E. Freeman was to have the lot in controversy, and the defendant was to have other property, exclusive of the lot, in full of her share in the common holdings. On April 7, 1897, the father conveyed to defendant Harriet

Digitized by Google

by warranty deed various pieces of property including the lot in controversy. The mother joined in the deed. This deed was made in furtherance of the relations between the parties with respect to the property, and with the understanding and agreement that Harriet was to hold the legal title in trust, and when the time for division came she was to convey accordingly. While the deed recited a consideration of $500, the defendant paid nothing at the time; the real consideration being as already mentioned. When the deed was made the father was of advanced age and in feeble health, and defendant Harriet was his confidential agent and adviser and attended to his business affairs. She assented to the trust condition upon which the legal title was placed in her, and agreed to make the conveyances to the others of their respective parcels, including a conveyance to John E. Freeman of the lot in controversy. She was also the trusted agent of her brother, John E. Freeman, but after his death, which occurred November 7, 1901, she repudiated the trust relation, and sought to defraud the complainants, who are his heirs, out of the property. There were also averments of a bona fide attempt by the defendant, during the lifetime of John E. Freeman, to execute the trust in respect of the lot in controversy, but which failed for reasons that will be mentioned in a discussion of the evidence. In our opinion these averments are of a trust arising by implication of law within the rule of Rayl v. Rayl, 58 Kan. 585, 50 Pac. 501, which may be established by parol evidence. It was charged by fair inference that the consideration for the conveyance of the legal title to the defendant was not paid by her at the time the deed was executed, but consisted of the previous payments and contributions of money made by the three children, and particularly by John E. Freeman, and that by agreement, and without any fraudulent intent existing at the time, the lot in controversy conveyed to the defendant was to be held by her in trust for John E. Freeman.

In approaching a consideration of the evidence, it is proper to say that, while this suit directly involves but one piece of property, the actual dealings of the parties took a much wider range, embraced quite a number of parcels of land, and covered a period of more than 10 years. The particular transaction in question did not begin and end on the day the legal title was conveyed to the defendant. It was but a part of a comprehensive course of dealing, and, as it was inseparably related to and dependent upon other transactions of like character, a true conception of it requires a consideration of all its accompaniments. It should also be observed that it was not necessary to the creation of an implied trust that John E. Freeman should have paid all of the consideration for the deed from the father to the defendant, or that what he did pay should be separable from the remainder of the consideration and some specific and divisible part thereof have been intended to apply to the particular lot in question, as distinguished from the remaining property, all of which in the aggregate was the subject of their transactions, or that the consideration paid by him should have been paid at the precise time the deed was executed. If the evidence shows that John E. Freeman paid, in whole or in part, the consideration for the deed from the father to the defendant, and that by agreement and without any fraudulent intent the latter took the legal title

Digitized by Google

so conveyed in trust for those whose payments constituted the consideration, and it was afterwards determined that upon the apportioning of their interests John E. Freeman was to have the lot in controversy, we then have a trust arising by implication of law which need not be in writing signed by the party creating it, but of which the proof may rest in parol.

In 1888 the Freeman family consisted of the parents, three sons, and a daughter. The sons were Elijah, Henry, and the complainants' intestate, John E., and the daughter, the defendant Harriet. They were industrious and saving and accumulated considerable real property, consisting of improved and unimproved lots in Topeka and a farm of about 600 acres of land in Wabaunsee county, Kan. In July, 1888, John E. Freeman married the complainant Ida. A few days before his marriage he conveyed to his mother the real property which he owned in Topeka, consisting of a number of improved lots and an interest in others. This conveyance was voluntary and without any consideration moving from the grantee. The deed was recorded the day before his marriage. The title to the farm in Wabaunsee county stood in the name of his son Henry, until before his marriage he conveyed it to one of his parents. Elijah also owned some property which took a similar course, and there was some in the name of the defendant. In addition there was some property, including the lot in controversy, the title to which was in the name of the father. The result of these conveyances was that the title to all of the real estate in Topeka and the farm in Wabaunsee county belonging to the members of this family became vested in the parents and the daughter. The only credible explanation of the conveyances by the sons is that found in the testimony of the complainant Ida, who said that the purpose was that all the real estate of the family should be held in partnership; that thereafter the property was so regarded and dealt with; and that the members of the family called themselves the Freeman firm. Some of this property was incumbered, and from time to time the incumbrances were reduced and finally paid. Some of the lots conveyed by John E. Freeman to his mother were sold, and the proceeds in part applied to the discharge of mortgages. The property was handled and dealt with, taxes thereon paid, repairs and improvements made, and rents collected, as a common property, without regard to any individual ownership. About 18 months after his marriage, the son John removed to Chicago. He was accidentally killed November 7, 1901. Shortly before this Elijah removed to California. Henry, at some time not indicated by the record, removed to the farm in Wabaunsee county, where he died in 1896, leaving a widow. Harriet, who never married, remained in Topeka with her parents, looked after the common property, and received and applied the contributions from the other members of the family. The father died in the fall of 1902 at the age of 94 years. The mother was 80 years of age when she gave her testimony in 1905.

John E. Freeman had been in the service of the Santa Fé and St. Louis and San Francisco railroad companies for about 25 years. He was a cook in the private cars of the presidents of those companies, and his salary ranged from $60 to $95 per month with additions by

Digitized by Google

way of tips and presents. For many years, commencing before his marriage, and ending shortly before his death, a substantial part of his earnings was paid to his father and sister to be applied to their household expenses and to incumbrances, improvements, and taxes upon the real property. For the most part the remittances, aggregating several thousand dollars, were made direct to the defendant, and these remittances were continued although the family of John E. Freeman was growing in size and the cost of their support and maintenance was increasing, and although defendant and her parents who were living in the homestead were possessed of property worth nearly $20,000, if her testimony is to be believed. During her husband's absence from home, the complainant Ida drew his monthly wages and attended to the remittances to the defendant at Topeka. The son Elijah also contributed to the common account a part of his earnings, though the proof is not definite as to the amounts or dates, and while living in Topeka he devoted his labor to the repair and improvement of the property. A letter written by Henry Freeman in November, 1891, appearing in the record, indicates that he also was laboring in the common interest. A statement of his farm operations for the year showed the amount of his receipts, and that after paying the taxes and insurance and the cost of some improvements he had applied $1,200 upon an indebtedness in which they were interested and had but $81 left for household expenses. It is doubtful that Harriet personally contributed much of consequence besides her attention to her parents, to the property, and to the money contributed by the others. She testified that she kept lodgers and earned money in that way, and that she had accounts of her personal affairs and an account in bank, but she produced no evidence but her own words, which were indefinite, vague, and unsatisfactory. Notwithstanding all this, at the time of the trial, through deeds from her parents, the title to all of the property of the family stood in her name, excepting some parcels which she had previously conveyed to John E. Freeman as part of his share. The property in her name and which she claimed to own absolutely was at her own valuation worth over $17,000 after deducting incumbrances. She said that the farm had been conveyed to her by her parents by way of gift. The lot in controversy and other lots were conveyed to her for a recited consideration of $500. This is the deed which complainants attack as an absolute transfer and claim was a conveyance in trust. Defendant says she paid the $500, but our conviction is otherwise. The various letters written and the acts of the parties during the years preceding the controversy, and the testimony that is in harmony with those letters and acts, and therefore the more credible, have convinced us that the consideration for this deed and the other deeds to the defendant consisted in the contributions of all of the children, and that there was an unqualified agreement that she was to hold the title in trust pending a division among them. There was that verity in the correspondence and acts of the parties which renders futile the denials born of the temptation which arose upon the death of John E. Freeman. So much for the consideration which moved the father to make the deed to the defendant and the substantial participation of John E. Freeman in the payment of that consideration.

Digitized by Google

Most of the letters introduced in evidence were addressed to John E. Freeman, and were produced by the complainants. The defendant said that those she received from him had been destroyed; but her written words, when read in the light of admitted and proven facts, clearly show that during his lifetime she recognized the conditions upon which she acquired title, that he was entitled to a share of property, and that the lot in controversy had been set off to him in the division. Before referring to the letters bearing upon this feature of the case, it should be said that the deed to defendant of April 7, 1897, conveying the lot in controversy and other property, was not recorded until after the death of John E. Freeman, though he knew of its existence. On March 28, 1900, the defendant prepared a deed from the parents to John E. Freeman conveying the lot in controversy, subject to a life estate in the grantors, and when it was executed and acknowledged she signed as a witness to their signatures. This deed was not delivered to John E. Freeman until shortly before his death. The letters written by the defendant indicate that early in 1901 John E. Freeman was pressing for a division of the property. On February 25, 1901, she wrote him that the lot in controversy was his, and that she had on hand $1,100, including Elijah's checks and farm rent after payment of taxes. On March 11, 1901, she wrote him that she would answer him in full in a few days, and that she thought there was some way of adjusting their matter satisfactorily. On March 18, 1901, she wrote as follows:

"Mother says when we meet that the farm can be adjusted agreeable to all she thinks and the reason she said for the north lot to be Liges. You all are to have the lots at their death, but she thought if you took them now and improved them you of course would expect the income from your investment which is right. * * * We ask both of you all to give advice or some idea as to the division. Your last letter is the first we ever got. But I feel that things will be alright."

The evidence warrants the conclusion that the lots the defendant referred to in this letter were two adjoining lots on Kansas avenue, in Topeka, the south one being the one in controversy, and that it was the intention that Elijah Freeman have the north one. On October 13, 1901, she sent him the deed of March 28, 1900, purporting to convey the lot in controversy, also two deeds from herself, one for a part of the farm in Wabaunsee county, and the other for a small tract of land in Topeka. None of the deeds had been recorded. In the letters accompanying them she said that she would have attended to the matter sooner, but wished to be careful to make no mistakes; that she had done her utmost to adjust matters, and hoped she had. Evidently, John E. Freeman acknowledged receipt of the deeds and expressed his satisfaction, for on November 5, 1901, she wrote him that she received his letter and was glad that things met with his approval; that she should have attended to matters before, but as that was their final decision she supposed all was well, and she put it off for a convenient season. Two days afterwards John E. Freeman was killed; the defendant attended his funeral in Chicago on November 11th; and on the 14th, after her return to Kansas, she placed her deed of April 7, 1897, of record, and asserted that she owned the lot in controversy.

Digitized by Google

The three deeds to John E. Freeman were recorded December 4, 1901. The claim of defendant that the deed of March 28, 1900, was merely to secure John E. Freeman for moneys which he agreed to advance for the improvement of the property, and that as he advanced none he took no title, is not worthy of serious consideration. It is inconsistent with evidence that satisfies our judgment and with the whole atmosphere of the case.

In the fall, winter, and spring of 1901–02, a building was constructed upon the two lots on Kansas avenue; the south one being the lot in controversy. The work was commenced in September, 1901, before the defendant sent the deed of March 28, 1900, to John E. Freeman. To raise part of the cost she mortgaged both lots for the sum of $1,500. The mortgage was unsatisfied at the time of the hearing. The improvement of these lots by the construction of a substantial building was the subject of frequent discussion with John Freeman prior to his death. Details of construction, estimates of cost, and propositions for rental were submitted to him. The defendant has not shown that any part of the cost of this improvement above the proceeds of the mortgage referred to was paid from her personal resources.

Our conclusions are that when the title to the property of this family, including the lot in controversy, was vested in the defendant, a part of the consideration for the conveyances was paid by John E. Freeman; that when defendant acquired the legal title it was taken in good faith, without any fraudulent intent, and for the benefit of those who paid the consideration, and it was so taken upon the understanding and agreement that there should be an equitable division thereof; that in the division subsequently agreed upon the lot in controversy fell to John E. Freeman; that the defendant expressly recognized his right prior to his death; and that the deed of March 28, 1900, from his parents to him, which was prepared and witnessed by the defendant and sent by her to him in October, 1900, was intended to be in fulfillment of her trust obligation, but was ineffectual for that purpose because of her prior deed from the same grantors.

The decree of the Circuit Court is therefore reversed, with direction to enter a decree requiring the defendant to convey the lot in controversy to the complainants by sufficient deed, subject, however, to one-half of the incumbrance mentioned as being upon it and the adjoining lot, and also subject to the life estate of Letitia Freeman, the mother. The decree should contain the usual provisions in case of her refusal. If the mother is still living, there should be no decree for rents and profits, because after the payment therefrom of taxes, repairs, and the proper proportion of the interest upon the incumbrance the remainder belongs to her. In case she is not living, the decree should provide for an accounting of rents and profits for the period subsequent to her death.

Digitized by Google

(153 Fed. 345.)

In re REMINGTON AUTOMOBILE & MOTOR CO. et al.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 202.

1. BANKRUPTCY—CORPORATIONS—UNPAID STOCK SUBSCRIPTIONS—ASSESSMENT BY TRUSTEE.

Where a corporation, at the time it became a bankrupt, could have laid an assessment on certain of its stockholders, whose stock was not full paid, such right passed by the bankruptcy to the trustee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 230.]

2. SAME—PROCEDURE.

Where, at the time a corporation became a bankrupt, certain of its stock issued was not full paid, the bankruptcy court, on the petition of the bankrupt's trustee for leave to levy an assessment on such stockholders, was bound to determine whether, at the time of the issue of any particular share, the full value was or was not paid in, whether any subsequent payments had been made on account thereof, whether the corporation was indebted in excess of assets, and the amount of such indebtedness.

3. JUDGMENT—RES JUDICATA—ISSUES.

In a plenary action by the trustee of a bankrupt corporation to recover an assessment levied against the holders of unpaid stock, the decision of the bankruptcy court, authorizing such assessment, was res judicata as to the amount paid by the stockholder for his stock, the indebtedness of the corporation, and the amount of the assessment, the stockholder being only entitled to make any individual defense he might have to such action.

4. BANKRUPTCY—CORPORATION—ASSESSMENT ON UNPAID STOCK.

An order authorizing the trustee of a bankrupt corporation to levy an assessment on certain of the corporation's unpaid stock should not provide for execution against the stockholders for the respective amounts found due on such assessment, which was collectible only by plenary action against the stockholders.

5. SAME—PROOF OF INDEBTEDNESS—CLAIMS.

On an application of the trustee of a bankrupt corporation for leave to levy an assessment on unpaid stock, the corporation's indebtedness was properly proved by presentation of the proofs of claim.

6. CORPORATIONS—LIABILITY OF STOCKHOLDERS—UNPAID STOCK.

Laws N. J. 1896, p. 284, c. 185, § 21, declares that where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts, each stockholder shall pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion thereof as is necessary to satisfy corporate debts. *Held*, that where a corporation directed the sale of certain of its stock of the par value of $100 per share at $25, and that the proceeds be used for regular expenses, the original purchasers of such stock were subject to assessment for the balance of the par value thereof, or so much as was necessary for the payment of corporate debts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 879.]

7. SAME—STOCK ISSUED FOR PROPERTY—VALUATION—BONA FIDE PURCHASERS.

The stock of a corporation to the amount of $8,000 was issued for property valued at the time for only $6,000. This stock was marked "full-paid" and certain of it was thereafter purchased in the open market by persons who, on request for information, were informed by the corporation's manager at its office that the stock was full paid. *Held*, that such stockholders, on the corporation becoming a bankrupt, were not liable

Digitized by Google

to assessment to the amount of the difference between the value of the property and the par value of the stock.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 973.]

8. SAME.

Laws N. J. 1896, p. 293, c. 185, § 49, authorized corporations to issue full-paid stock for property, and declared that, in the absence of fraud, the judgment of the corporation's directors as to the value of the property should be conclusive. A corporation organized under such act contracted with a city's board of trade to remove its plant to such city in consideration of the board's purchase of shares of the company's stock at a price less than par, and to furnish the corporation a free site for its buildings. Certificates purporting to be full paid were issued to the board and sold to subscribers at the same price the board paid for it; the board also procuring a conveyance to the corporation of the site, which was accepted in fulfillment of the contract. *Held*, that such stock would be regarded as full-paid, and that neither the board nor purchasers from it were liable to further assessments for the benefit of creditors of the corporation after bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 973.]

9. SAME.

A bona fide purchaser of certain of such board of trade stock from the corporation, under the belief that the stock issued to him was issued pursuant to the board of trade agreement, but which in fact had been issued by the corporation to be sold for cash at less than par, was not bound to pay future installments on such stock.

[Ed. Note.—Liability of transferrors and transferees of corporate stock for assessments, see note to Campbell v. American Alkali Co., 61 C. C. A. 322.]

Appeal from the District Court of the United States for the Northern District of New York.

This cause comes here upon appeal from an order of the District Court, Northern District of New York, which set aside certain contracts made by the bankrupt corporation with its various stockholders, found that certain of its shares represented stock which was not full paid, and ordered that a call and assessment be made upon the holders of such shares to an amount sufficient in each case to make the stock full paid. As to certain other of the stockholders it was further adjudged that they were not liable for any unpaid subscriptions. The opinion below is reported in 139 Fed. 766.

L. M. Southworth and George E. Dennison, for appellant.

F. G. Fincke, C. H. Searl, W. G. Miller, and Fuller & Miller, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The case is an intricate and complicated one, because of the issues of stock made from time to time to different individuals under different circumstances. The district judge has fully and carefully stated the facts necessary to be considered, and has set forth the relevant documents in full. It would be a waste of time to restate them here, except so far as may be necessary to an understanding of the different conclusions hereinafter expressed.

The Right to Make Assessment.

The Remington, etc., Company is a New Jersey corporation, and subject to the following statutory provisions (chapter 185, p. 277, Laws N. J. 1896):

Digitized by Google

"Sec. 21. Stockholders liable until subscriptions are fully paid.—Where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy such debts and obligations."

"Sec. 48. Nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this act, except as hereinafter provided in case of the purchase of property, and no loan of money shall be made to a stockholder or officer thereof; and if any such loan be made the officers who make it, or assent thereto, shall be jointly and severally liable, to the extent of such loan and interest, for all the debts of the corporation until the repayment of the sum so loaned.

"Sec. 49. Any corporation formed under this act may purchase mines, manufactories or other property necessary for its business, or the stock in any company or companies owning mining, manufacturing or producing materials, or other property necessary for its business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable for any further call, neither shall the holder thereof be liable to any further payment under any of the provisions of this act; and in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation to be published or filed this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the fact."

Had the corporation not become bankrupt, it could have laid an assessment upon such of its stockholders as were liable for further calls to make up full payment, and the right to make an assessment and call passed by the bankruptcy to the trustee. The Supreme Court, in Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968, holds that the proper practice in such cases is for the trustee to file petition in the bankruptcy court for an order directing him to make an assessment and call upon the unpaid stock of the corporation for the purpose of paying its debts. In order to determine whether such an order should be made, it is necessary for the court to examine into and decide certain questions of fact, e. g., whether at the time of the issue of any particular share the full value was or was not paid in, whether any subsequent payments were made on account of it, whether the corporation was indebted in excess of assets, and what is the amount of its indebtedness. We are unanimously of the opinion that the practice followed in this case was correct, and that the decision of the District Court as to any question the decision of which was necessary to the making of the order will be res adjudicata in any subsequent proceeding between the trustee and any stockholder who received notice of the proceeding. Thus, in a plenary action against a stockholder to enforce assessment, he cannot be heard to question the findings made in this proceeding as to the amount paid for the stock, as to the indebtedness of the corporation, or as to the amount of the assessment; but he may present and make proof of any individual defense which he may have to such action. In this connection it may be noted that the phraseology of the order is such that it might be contended that execution for the respective amounts might be issued against the individuals named. This should be corrected.

The writer is further of the opinion that, inasmuch as the stockholder is to be concluded as to the amount of corporation indebtedness by

Digitized by Google

the finding in the bankruptcy court, he is entitled to have that amount proved by the best evidence, if he appears and asks for it. In the case at bar the indebtedness was proved merely by presentation of the proofs of claim. To this counsel for stockholders objected, and claimed the right to cross-examine whoever might swear to the debt. His contention was overruled and exception reserved. The writer is of the opinion that this was reversible error, but the majority does not think so.

The Ilion Stock.

Certain shares of stock were issued to citizens of Ilion, N. Y., under a resolution which directed that they "be issued to be sold at $25 per share, and that the proceeds of such sale be placed in the treasury to be used for regular expenses." Nothing further was ever paid in on account of such stock. The District Court held that each share of such stock was not issued as "full paid," and that each holder thereof was liable for $75. We are of the opinion that such stock was not full paid and is liable to assessment. A majority of the court find in section 21, quoted supra, sufficient warrant for such assessment without discussing the question on general principles of corporation law. We are all of the opinion that the amount of each individual assessment can be collected only by plenary action. The persons who hold such stock (except Taber, hereinafter referred to) are the original subscribers who took it under the resolution above referred to, and apparently under an express contract with the corporation that it should locate its factory and carry on its business in Ilion. This contract was broken by the corporation, and we express no opinion as to whether that breach of contract may be availed of as a defense to an action to recover the assessment from an individual stockholder.

The Quick Stock.

This was stock issued to the amount of $8,000 for property which was valued at the time at $6,000 only. The Circuit Court held that the original subscribers were liable for $25 a share, and no one disputes the correctness of that finding. Four persons who now hold the stock were not original subscribers. They bought in ignorance of the transaction, the certificates they received were marked "full-paid," and they were informed by the manager of the company, from whom they made inquiries before purchasing, that it had been issued for property and was full paid. Very many authorities are cited on the briefs, but not one of them holds that a stockholder, who is not a subscriber, but who buys in good faith in the open market stock which is marked full paid, and which he is informed at the office of the corporation is in fact full paid, can be held liable for the proportion of its face value which may be then unpaid. None of the New Jersey cases, construing the statute of that state, to which we are referred, deal with the question. They are concerned with stockholders, who were original subscribers. The authorities cited in Cook on Stock and Stockholders, §§ 50, 51, sustain the views above expressed. The decision of the District Court as to the four persons who bought shares of this "Quick" stock from original subscribers is affirmed.

Digitized by Google

The Chamber of Commerce Stock.

Several hundred shares of the stock were issued to persons designated by the Board of Trade (or Chamber of Commerce) of the city of Utica. Each person so receiving stock paid $30 a share in cash. The District Court held that they were not liable for the additional $70 per share, and a majority of this court concur in that conclusion. The documents will be found printed in full in the opinion below. The stock was issued under a resolution that:

"An option be given to the Utica Chamber of Commerce until February 23d for the securing of the permanent location of this company in the city of Utica upon condition that they supply us with $30,000 in cash through the sale of our stock at $30 per share, and upon further condition that they supply us with a factory site of from three to four acres to our satisfaction, the same to be deeded to the company free and clear of all incumbrances. The above conditions being complied with, 1,000 shares of our capital stock is to be issued, in the name of whoever the Utica Chamber of Commerce specifies at $30 per share, each share full paid and nonassessable."

This was subsequently modified by reducing $30,000 to $15,000, and 1,000 to 500. Thereafter the Chamber of Commerce did obtain an option to buy on reasonable terms a site with buildings upon it available for a plant (the original agreement called for a vacant site only), and tendered the same to the company with $1,000 as performance of its contract, which was accepted by the corporation. A majority of the court think the transaction was one directly with the Chamber of Commerce, and that it came within the provisions of section 49 of the New Jersey statute cited supra, and that the holders of such stock are not liable for assessments thereon, upon the theory that it was not full paid.

Taber Stock.

One W. E. Taber, a machinist of Utica, having heard of the arrangement made by the Chamber of Commerce, went to the secretary of that body and applied for 10 shares. The secretary gave him a letter to the manager of the company. He went to the latter and said he wanted 10 shares of Chamber of Commerce stock. The latter gave him a certificate for 10 shares, which he represented to be such stock and took $30 a share from Taber. As the district judge found;

"He acted in entire good faith and in the belief that he was obtaining the stock under and pursuant to the Chamber of Commerce agreement as set out in the circular, and that said Chamber of Commerce had provided for full payment of said stock. The certificates were delivered to him as Chamber of Commerce stock, paid for as such, and accepted as such."

The manager gave him a certificate which represented 10 shares of "Ilion" stock, which the original holders thereof had returned to the company. The liability of a subscriber or stockholder to pay future installments on his stock is wholly contractual. Taber certainly made no express contract to that effect, and we are of the opinion that the circumstances do not warrant the holding that there was an implied contract to do so.

As to the rulings of the District Court touching other issues of stock, no error was assigned.

Digitized by Google

With the exception of the Taber stock, therefore, the order of the District Court is affirmed, and the cause remitted, with instructions to add a clause to the effect that it shall be without prejudice to any defenses which individual stockholders may have to a plenary action to collect the amount of their respective assessments. As to the Taber stock, the order is reversed.

(153 Fed. 350.)

BRADLEY v. LEHIGH VALLEY R. CO.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 154.

1. SHIPPING—LIABILTIY FOR LOSS OF CARGO—EXEMPTION UNDER HARTER ACT.

A carrier by water can only avail himself of the exemptions from liability for errors of management and navigation provided by Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], by affirmative proof that the vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so, and such affirmative proof cannot be supplied by inferences or presumptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 492.

Statutory exemption of shipowners from liability, see note to Nord-Deutscher Lloyd v. President, etc., of Insurance Co. of North America, 49 C. C. A. 11.]

2. SAME.

Under a contract of affreightment to carry wheat to the port of New York and there deliver it on board a vessel for export, where the wheat on reaching that port was loaded into a canal boat for transport and delivery to the designated vessel by the carrier's tug, the carrier is liable for its loss through the sinking of the canal boat, whether resulting from unseaworthiness or from the negligence of the towing tug or of the master of the boat; its seaworthiness not being affirmatively shown.

3. CARRIERS—LIABILITY FOR LOSS OF GOODS—STIPULATION FOR INSURANCE.

A bill of lading provided that, in case of loss or damage to the goods, the carrier should have the benefit of any insurance for or on account of the owner, and should be subrogated to its rights before any demand on account of such loss or damage should be made. The shippers obtained a policy of insurance on the goods, conditioned that it should not inure directly or indirectly to the benefit of any carrier or bailee by stipulation in bill of lading or otherwise, and that it should be null and void to the extent of any amount recovered from any carrier or bailee. The goods having been lost by the carrier, the insurer advanced to the shippers an amount equal to the insurance, taking a receipt reciting that it was received "as a loan without interest, and repayable only to the extent of any net recovery we may make from the carriers responsible for the loss." *Held*, that the provision of the bill of lading did not obligate the shippers to insure for the benefit of the carrier, nor, if they did insure to effect, such insurance as would protect the carrier, but that they were free to procure the insurance they did; that the advance made by the insurance company was not a waiver of the conditions of its policy, and did not extinguish the liability of the carrier nor constitute a defense to an action against it to recover for the loss.

4. PAYMENT—EFFECT OF PAYMENT BY THIRD PARTY—DISCHARGE OF OBLIGATION.

Payment of an obligation of another by a third party does not discharge it as between the original parties unless the payment is made and received with the intention that it shall do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 6, 136.]

Digitized by Google

Appeal from the District Court of the United States for the Southern District of New York.

Appeal in admiralty from a decree in personam (145 Fed. 569) adjudging the respondent liable for the loss caused to a cargo of wheat by the sinking of the canal boat upon which the wheat was being transported.

H. G. Ward, Wm. S. Montgomery, and Robinson, Biddle & Ward, for appellant.

Lawrence Kneeland and Black & Kneeland, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The libelant is the assignee of Nourse & Co., who were the shippers of the cargo of wheat which was damaged by the sinking of the canal boat Dean. The wheat, when damaged, was in the course of transportation by the Lehigh Valley Railroad Company as a common carrier under a through contract of affreightment by which it was to be carried from Toronto, Canada, to the port of New York, and there be delivered on board a steamship for further transportation to Leghorn, Italy. It had been received by the railroad company at Communipaw, N. J., and there laden on board the canal boat Dean, and before daylight on the morning of January 23, 1903, the company's tug Mercedes took the Dean, together with the canal boat Igo, to tow them to the steamship, which was then lying in her slip at the foot of Forty-Second street, Brooklyn.

The libel proceeds upon two theories—one that the company was liable because the loss occurred by the negligent towage of the company's tug, and the other that it was liable as a common carrier for a breach of its obligation to safely transport and deliver the wheat. The court below was of the opinion that the loss was caused by the negligence of the tug in bringing the Dean into contact with the ice. The proofs show that, when the towage service was begun, the tide was flood, and the ice which had previously obstructed the channels had been carried up the North and East rivers so that the channels were free, but considerable ice remained in the slips, where the wind kept it from the action of the tide. When the tug and canal boats reached the slip at Forty-Second street, the vessels were stopped outside, and the tug pushed the canal boats into the slip slowly through the ice, until the master of the tug thought there was risk in pushing them further because of the thicker ice, and the tug was about to leave, when the master of the Dean insisted that she should be pushed further into the slip. The master of the tug, after objecting, yielded, and the tug pushed her further in. That there was some risk in doing this is apparent, because before leaving the Dean the master of the tug cautioned the master of the Dean to measure her water, in order to see if her condition was satisfactory. The latter measured, and reported that she was all right. About an hour later the master of the Igo, which boat was then lying alongside the Dean, noticed that the Dean was lower in the water than she had been, and he called her captain, and said, "Your boat has got about four inches

Digitized by Google

of water in her." The captain answered: "That's about right." About an hour later he again called the attention of the latter to the Dean's condition, and then she was found to be filling with water so fast that the pumps could not remove it. She sank soon after.

The Dean was an old boat, having been built in 1874. She had been rebuilt in 1888, and was overhauled somewhat in 1893. No evidence of her seaworthiness was given, except that on some previous occasion she had passed inspection and been classified by the underwriters as fit to carry grain, but at what time this was did not appear.

In the view which we take of the facts, it is not material whether the towage service was negligently performed or not. So far as appears, the tug would have left the Dean in a safe and proper place, and would have fully performed her towage service if the master of the Dean had not for his own convenience insisted upon having his vessel pushed further into the ice. If the tug was negligent, the railroad company as her owner was, of course, responsible. If the tug was not negligent, the company was responsible for the breach of its duty as a common carrier to carry the wheat safely on the Dean, because the disaster was caused in part at least by the conduct of the captain of the Dean. The contention of the appellant that this conduct was an error in the management of the vessel, and because of the provisions of the Harter act (Act Cong. Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) it was relieved of responsibility as a common carrier, cannot be sanctioned. There was no affirmative evidence to show that the Dean was seaworthy at the beginning of the voyage, or even at a time approximately near the beginning of the voyage. The carrier can only avail himself of the exemptions from liability for errors of management and navigation, provided by section 3, by affirmative proof that the vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so. This affirmative proof cannot be supplied by inferences or presumptions. The Wildcroft, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794. The evidence in the present case failed to comply with the requirements of the rule.

It is contended for the appellant that the court below erred in overruling its defense founded upon a stipulation contained in the bill of lading under which the wheat was being transported. That stipulation was:

> "That in case of loss or damage to the goods the carriers shall be given the benefit of any insurance for or on account of the owner of said goods, and shall be subrogated in their rights before any demand shall be made upon them in respect to such loss or damage."

There was an insurance on the wheat in favor of Nourse & Co., which had been effected with the Sea Insurance Company under a policy, which, among others, contained the following conditions:

> "It is warranted by the insured that this insurance shall not enure directly or indirectly to the benefit of the carrier or other bailee by stipulation in bill of lading or otherwise, and that this policy shall be null and void to the extent of any amount paid or recoverable from any carrier or bailee."

After the loss occurred, and before the assignment of their demand by Nourse & Co. to the libelant, the insurer advanced to Nourse &

Digitized by Google

Co., $3,992.85, a sum equal to the amount of the loss, and took a receipt therefor, which recited that the amount had been received "as a loan without interest, and repayable only to the extent of any net recovery we may make from the carriers responsible for the loss." The appellant insists that this transaction should be regarded as a payment of the loss, and operated to extinguish any right of Nourse & Co. to recover therefor. Treating the transaction as a payment of the loss, it did not discharge the liability of the railroad company upon the theory of extinguishment. Payment of an obligation of another by a third party does not discharge it as between the original parties, unless the payment is made and received with the intention that it shall do so. Bleakley v. White, 4 Paige (N. Y.) 654; Muller v. Eno, 14 N. Y. 605; King v. Barnes, 109 N. Y. 289, 16 N. E. 332. The real question is whether the transaction defeated the right of subrogation of the railroad company secured by the stipulation in the bill of lading.

When the transaction took place, the insurance policy had become void at the election of the insurance company, because of the breach of the warranty. Although the insurance company was entitled to insist upon its right to treat its contract as nugatory, it could, if it chose, waive that right and treat the policy as a valid and existing one. By making an unconditional payment of the loss, it would have waived the breach, in the absence of some agreement or understanding to the contrary between the parties to the transaction. But the parties were at liberty to agree that the payment should not be unconditional, or that it should not operate as a waiver, or that it should be regarded as a loan or as a gratuity. The receipt indicates plainly that they did not intend the transaction to be an unconditional payment, or regarded as a payment of the loss in any sense. Its form was carefully devised for that purpose. It is industriously framed to show that the money advanced was not advanced in payment of the loss; and apparently to deprive the railroad company from obtaining any benefit from the insurance, and enable Nourse & Co., or some assignee or appointee of theirs, to recover the loss from the railroad company for the benefit of the insurance company. It is not important that Nourse & Co. may not have expressly consented to receive the payment as one not made by the insurance company in recognition of its liability. It suffices if the insurance company did not intend to recognize its liability. As is pointed out by Chief Justice Shaw, in Farlow v. Ellis, 81 Mass. 231, a waiver is the relinquishment of a right which otherwise the party making it would have enjoyed, and the voluntary choice on his part not to claim the benefit is of the essence of the waiver; and whether there has been a waiver is a question of fact, depending upon the intention of the party against whom the waiver is asserted. That the insurance company did not intend to waive its right to treat the insurance as nugatory can hardly be questioned. The struggle between carriers and insurers to escape ultimate loss when insured cargo has been damaged or destroyed while in the custody of the carrier has resulted in efforts by each to cast the burden upon the other by the insertion of astute provisions in their respective contracts with the shippers or owners of cargoes, and by availing themselves of every technical ad-

Digitized by Google

vantage to secure the benefit of their own provisions. To infer that an insurance company has intentionally foregone such an advantage would be to indulge in a violent and preposterous presumption.

Notwithstanding the stipulation in the bill of lading Nourse & Co. were under no legal obligation to effect any insurance for the benefit of the railroad company. The carrier is undoubtedly entitled by a stipulation in his contract to reserve to himself the benefit of any insurance which the shipper may effect or may have effected on the goods, although he thereby shifts from himself to the insurer the loss for which he is primarily responsible; but any stipulation which requires the shipper to procure insurance for the benefit of the carrier in case of loss is void. Inman v. South Carolina Railway Co., 129 U. S. 139, 9 Sup. Ct. 249, 32 L. Ed. 612; The Hadji, 22 Blatch. 235, 20 Fed. 875. The same reasons which forbid the enforcement of a stipulation requiring the shipper to insure for the benefit of the carrier would forbid the enforcement of one requiring him when he does effect insurance to procure such as will protect the carrier. The shipper cannot be circumscribed in his liberty to make such a contract with the insurer as he chooses. If he sees fit to make one which may be worthless to the carrier, it is his right to do so. The present stipulation does not purport to circumscribe that right. The contract which Nourse & Co. saw fit to make with the insurance company was framed so as to render the insurance worthless to the railroad company at the option of the insurer. Unless the insurance company waived that option, and made the advance to Nourse & Co., as a payment for insurance in recognition of its liability, Nourse & Co. never obtained any insurance, and there was none to which any right of subrogation under the stipulation in the bill of lading could attach when the present action was brought. We conclude that there was no defense to the action arising from the stipulation.

It is argued for the appellant that an erroneous basis for the computation of the loss was adopted by the court below in view of the stipulations in the bill of lading. We regard the case as controlled by the decisions of this court in The Styria, 101 Fed. 728, 41 C. C. A. 639, and the Manitou, 127 Fed. 554, 63 C. C. A. 109, and not distinguishable from these cases by the slight difference in the language of the stipulation.

The decree is affirmed, with interest and costs.

(153 Fed. 354.)

MOIT v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. May 10, 1907.)

No. 1,616.

1. MASTER AND SERVANT—ACTION FOR INJURY OF SERVANT—EVIDENCE OF MASTER'S NEGLIGENCE.

Where plaintiff, a car repairer employed by defendant railroad company, was injured while repairing the trucks which had been removed from under the end of a car by the falling of the end of the car which had been jacked up by other employés, and rested upon the jacks, there was no presumption of negligence on the part of defendant arising from the

Digitized by Google

accident itself, and no ground of recovery against it for the injury was shown, in the absence of any substantive proof of its negligence or of any evidence to show what caused the car to fall.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 881, 898.]

2. SAME—UNSAFE PLACE TO WORK—NEGLIGENCE OF FELLOW SERVANTS.

The jacking up of the end of a railroad car for the purpose of repairing the trucks was not a part of the master's duty of providing a reasonably safe place for the employés to work, but a part of the duty of the servants making the repairs, and there can be no recovery against the master for an injury resulting to a fellow servant from their negligence in doing the work, the appliances furnished by the master not being shown to have been insufficient nor defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 352.]

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Jere Horne, for plaintiff in error.

A. W. Biggs, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit for personal injury. The plaintiff below was a car repairer. He was at work under the trucks removed from one end of a jacked-up box car. While thus engaged, the end of the car fell upon his legs, which extended beyond the trucks. The court below directed a verdict for the railroad company on the ground that there was no proof that its negligence caused the injury.

The evidence below was limited to the plaintiff, George W. Moit, at the time of the accident employed as a car repairer in the shops of the Illinois Central Railroad Company, at Memphis, Tenn., and an employé who worked along with him, his so-called "partner," John K. Brigance. On February 18, 1905, Moit was ordered by his foreman to assist Brigance in placing a bolster on the trucks of a car then in the yard. When Moit and Brigance reached the car, they found one end of it jacked up and the trucks removed. These trucks were still partly underneath the jacked-up end. It was necessary for Moit and Brigance, in order to do their work, to remove the nuts from certain bolts connected with the trucks. These bolts held the bolster on. Moit found that the nuts could not be removed with a wrench; they had rusted, and the bolts would turn with the nuts. As a result, it became necessary to cut the nuts off, and Moit was under the trucks holding an iron maul against a nut while Brigance cut it off with a cold chisel, when the accident occurred. While Moit and Brigance were thus at work, Moit's legs extending to a point beneath the end of the car, the jacks gave way, and the end of the car fell. It struck the trucks, rolled them away, and fell upon Moit's legs, injuring them so severely that one had to be amputated, and the other was so crippled as to become almost useless.

The car was an ordinary freight or box car. It was jacked up in the customary way for an empty car. There was testimony tending to show that a loaded car, when jacked up, was ordinarily supported by

Digitized by Google

trestles. As to whether this car was loaded or not, Moit was without knowledge. The door of the car on his side, as he passed it going to his work under the trucks, was fastened. Brigance testified that "the car was loaded with shavings, sawdust, trash, out of the shed." But Brigance did not discover this until after the accident, and the testimony he thus gives is far from satisfactory upon the point that the car was "loaded" in the common acceptation of the term, and needed to be supported by trestles when jacked-up. Indeed, there is no proof whatever upon the latter point.

The only explanation given, or offered, of the cause of the accident, was by Brigance, who, when asked what caused the car to fall, said:

"I could not tell, without the ground was froze and kinder thawing that evening, and the jacks slipped. The car slued and caused it to fall, I think."

This is a mere conjecture on the part of Brigance, for he says his back was turned to the car when it fell. There is no other testimony on this point; nothing tending to show that the jacks were defective, or that they gave way, or the car slued because of any fault on the part of the company.

1. Plaintiff's case was based upon the alleged duty of the railroad company to provide the plaintiff with a reasonably safe place in which to work and reasonably safe appliances with which to work. It contended that the car fell, either because the jacks were defective or were used in an improper and inefficient way; and it insisted that under the doctrine of res ipsa loquitur the fact of the accident itself made a prima facie case of negligence which the court should have submitted to the jury.

In the recent cases of Illinois Central R. R. v. Coughlin, 132 Fed. 801, 65 C. C. A. 101, Cincinnati, etc., R. R. Co. v. South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533, and Carnegie Steel Co. v. Albert Byers (C. C. A.) 149 Fed. 667,[1] we have had occasion to apply the rule laid down by the Supreme Court in Texas & Pacific R. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, and Patton v. Texas & Pacific R. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, wherein it was pointed out that what might make a prima facie case of negligence against a railroad company in favor of a passenger or a stranger would not apply as between the company and its employé. In the latter case there was no presumption of negligence arising from the accident itself, but the liability of the company to its employé must be made out by proof that the company was negligent, and this negligence brought about the resulting injury. If the testimony left the matter uncertain, indicating only that one of a number of things may have brought about the injury, for some of which the company was responsible, and for others not, it was not for the jury to guess between these numerous causes and find that the negligence of the company was the real cause, when there was no satisfactory foundation in the testimony for that conclusion. 179 U. S. 663, 21 Sup. Ct. 275, 45 L. Ed. 361. Thus, in the case of Carnegie Steel Co. v. Albert Byers, where a hydraulic jack used to elevate cars of molten metal, on which an electric locomotive partly stood, suddenly and unexpectedly, and without any apparent cause,

[1] 82 C. C. A. 115.

Digitized by Google

arose from its position, tipping the locomotive up and injuring an employé of the company who was upon it, we held that the mere fact that the elevator or jack arose without any apparent cause was not sufficient to make a prima facie case of negligence against the company. "The burden, however, was upon the plaintiff to make substantive proof of some negligence—the omission of some duty which the defendant owed to him. It was incumbent upon him to show either that the jack was an improper appliance, or that the company had been negligent in keeping it in reasonably safe repair. Looney v. Metropolitan R. R. Co., 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; Ill. Cen. R. R. Co. v. Coughlin, 132 Fed. 801, 803, 65 C. C. A. 101; Texas & Pacific R. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. There was no substantial evidence from which the jury might reasonably find that this accident was due to negligence. Its cause is wrapped in doubt and uncertainty. It may have happened from some cause for which the defendant was not liable or from actionable negligence. It was the duty of the plaintiff to make a case from which a jury might reasonably find negligence. This it did not do." 149 Fed. 673, 82 C. C. A. 121.

In the present case, there was no proof that the jacks were not reasonably safe appliances for the work for which they were designed. Nor was there any proof that they had been improperly used in jacking up the end of the car. We have referred to the proof respecting the loading of the car. The testimony of Brigance was not in our opinion sufficient to warrant the conclusion that the car was "loaded," in the sense that it required trestles to support the end which was jacked up. If it be urged that the car fell, and that is proof enough that either the jacks were defective or they were improperly used, it may be pointed out that any outside force which jarred the car and caused its lifted end to slue might have caused the jacks to give way. The chance of this happening was one taken by the car repairers. Indeed, the witness Brigance suggests an intervening cause which was purely external, namely, the thawing of the ground on which the jacks rested. Obviously, the unequal sinking of the jacks through thawing might disturb the equilibrium of the end of the car and cause it to slue and fall. Other illustrations might be given of the fact that the car might fall without any negligence on the part of the railroad company; but such negligence is essential, and must be supported by substantive proof in order to justify the submission of the case to the jury. Looney v. Metropolitan R. R. Co., 200 U. S. 480, 486, 488, 26 Sup. Ct. 303, 50 L. Ed. 564.

2. It is vigorously urged that in jacking up the end of the car the railroad company was providing a place for Moit to work, that whoever assisted in jacking up the car was doing the master's work, and, since the accident resulted from a failure to do this work, the company should be held responsible. This contention does not appeal to us. The jacking up of the end of the car for the purpose of removing the trucks and replacing a bolster was not a part of the master's duty of providing a reasonably safe place in which to work, but a part of the servants' duty of repairing the car. Wabash R. R. Co. v. Propst, 92 Ill. App. 485. That duty was intrusted to a number of employés,

Digitized by Google

including the plaintiff, Moit. It is true the car was jacked up and the trucks removed before Moit reached the ground. This work was done by his fellow servants. If they, or any of them, were negligent in doing it, it was the risk he assumed by reason of his employment. Of course, the rule of fellow servant does not apply to the condition of the jacks that were furnished by the railroad company for the purpose of lifting up the end of the car. That appliance had to be a reasonably safe one, and, if there were proof that the accident resulted from the negligent furnishing of insufficient or defective jacks, the railroad company would be responsible; but there is no such proof.

The judgment is affirmed.

(153 Fed. 358.)

REED v. MOORE & McFERRIN.

(Circuit Court of Appeals, Sixth Circuit. May 15, 1907.)

No. 1,617.

1. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff was employed in a box factory as a belt repairer and assistant to the machinery foreman, to whose orders he was subject. The freight elevator having fallen, plaintiff and the foreman started to repair it, and, without making any examination of the machinery, assumed that the elevator fell because of the breaking of the cord. A new cord was put in and a stop put on for the ground floor, when plaintiff and the foreman went up on the elevator to the second floor to put the stop on there, but before they could do so the elevator fell, injuring both of them. After the accident a complete examination of the elevator disclosed that the drum shaft was bent, and that the sprocket wheel and gearing were so broken as to be inoperative, either of which might have caused the accident. *Held*, that plaintiff assumed the risk in assisting to put the elevator in repair.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 551–558.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2. SAME—FELLOW SERVANTS.

Plaintiff and the foreman, while engaged in repairing the elevator, were fellow servants, so that plaintiff could not recover for the foreman's negligence in failing to discover the defects in the elevator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 486–490.

Who are fellow servants, see note to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Jere Horn, for plaintiff in error.

C. L. Marsilliott and C. A. Lightner, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The plaintiff in error, J. H. Reed, was injured by the fall of a freight elevator in the box factory, at Memphis, Tenn., of the defendants in error, Moore & McFerrin. There was no substantial dispute as to the facts of the case, and the court be-

Digitized by Google

low directed a verdict for the defendants. The elevator was an old one, and had several times been repaired. Its gearing, consisting of the sprocket wheel, cogs, etc., connected with the shaft and constituting the operating mechanism of the device, was located on the ground floor and covered by a sheet-iron hood, which not only protected it from the dust, but screened it from observation. The elevator was used for the purpose of carrying material from the ground floor to the second floor only, a distance of about 12 feet.

The duty of keeping this elevator, and, indeed, all the machinery of the factory, in repair, was intrusted to one Antone, the foreman of machinery in the plant. The plaintiff in error was employed as a belt repairer, but he acted as an assistant to Antone in making repairs on the machinery, and in that sense was a subordinate of Antone, and subject to his orders. On September 13, 1905, the elevator suddenly fell from the second to the first floor. It was loaded when it fell, but no persons were on it. Antone was notified of the fall, and called upon Reed to go with him and assist in repairing it. When Antone and Reed reached the elevator, they found that the cord which shifts the elevator up and down, was broken. The elevator was then at the ground floor. They took the old cord off and replaced it by a new one. Then it was necessary to place the stops on the new cord, so as to stop the elevator at the usual places. They put the stop for the ground floor on, and then went up on the elevator to the second floor to put the top stop on; but, before they could do it, the elevator fell, injuring both of them.

It seems that no examination of the operating mechanism of the elevator, either that outside or under the hood, except the cable or cord used to shift the elevator, which they found broken on their arrival, was made by Antone or Reed. When they found the elevator on the ground floor after its fall, and the shifting cable broken, they assumed that the break in this cable was the cause of the accident, and made no further examination. After the accident, a complete examination of the elevator, both that outside and that under the hood, was made, and it appeared that the fall was not due to the break in the shifting cable, but to defects in the operating mechanism; it being due either to the fact that the shaft which held the drum that carried the cable was bent about an inch, or that the sprocket wheel and gearing were so broken as to be inoperative. The sprocket wheel and gearing were covered by a hood; but it seems that the bent shaft was observable outside. It is fair to state that there was some conflict as to whether the shaft was bent before or after the elevator fell. It may have been bent by the fall of the elevator. The defect was not noticed before the elevator fell. The testimony narrows the cause of the accident to either the bent shaft or the broken gearing. One of these causes was observable outside the hood; the other was covered by the hood. One or both of the causes must have existed before the elevator fell the first time; for, after the shifting cable was repaired, the elevator again fell, indicating it was not the break in this cable which caused it to fall.

The legal question involved is whether, under all the circumstances, Reed assumed the risk involved in assisting to put this broken elevator

Digitized by Google

in repair. The general rule is that the employer is obliged, not only to furnish his employés a reasonably safe place to work in, but reasonably safe appliances to work with. This rule, however, is subject to the exception that if the employé either knows or ought to know that the place or the machinery is in a dangerous condition, and he is engaged in the work of putting in repair, he assumes the risks incident to the work of repair. He cannot act upon the assumption that the machinery is in repair, when he was employed for the very purpose of putting it in repair. There are many cases illustrating different phases of this rule. The exception applies, not only to the work of repair, but also to the risks incident to the work of construction. Thus, in Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440, it was held that:

> "The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not oblige him to keep a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow servants."

The case of Gulf, etc., Ry. Co. v. Jackson, 65 Fed. 48, 12 C. C. A. 507 (Eighth Circuit), grew out of the repair of a portion of the roadbed of the railroad which had been undermined. The accident was due to the obstructed condition of the ground where the work of repair was being done, and it was held that under the circumstances the injured person assumed the risks attendant upon such obstructed condition. In the case of C. & O. Ry. Co. v. Hennessey, 96 Fed. 713, 38 C. C. A. 307 (this circuit), where a servant was injured while handling a defective car which had been placed upon a special side track used for such cars, it was held that the placing of the car on the special side track was notice to the employé of its defective condition, and he was held to assume the risks of handling it. A somewhat similar case was that of Hauss v. Lake Erie & Western R. R. Co., 105 Fed. 733, 46 C. C. A. 94 (this circuit). Here a brakeman was injured through catching his foot in an unblocked frog on a part of the track under construction. Notice that work was being done on the track was held sufficient warning to the brakeman, and he was held to assume the risks of working about the track in its existing condition.

The case of Kelley v. Chicago, etc., Ry. Co., 35 Minn. 490, 29 N. W. 173, grew out of the handling by a brakeman of a disabled car. He was held to have assumed the risk. The case of Carlson v. Oregon Short Line Ry. Co., 21 Or. 450, 28 Pac. 497, grew out of the repair of the railroad track. The servant engaged in the work of repair was held to have taken upon himself the ordinary risks incident to such work, but not latent risks known to the master, but not disclosed to him or discoverable by the use of proper diligence. Another repair case, but this time of a trolley line, was that of Broderick v. St. Paul City Ry. Co., 74 Minn. 163, 77 N. W. 28. In this case the work of repair was the replacing of a wooden by an iron pole. In the case of Brick v. Rochester, etc., R. R. Co., 98 N. Y. 211, the plaintiff's intestate was killed while riding upon a construction train used in the work of repair. The train ran off the track by reason of

Digitized by Google

frozen mud alongside the track. It was held that the rule of a safe place did not apply, and the only negligence chargeable was that of a fellow servant. In the case of Dartmouth Spinning Co. v. Achord, 84 Ga. 16, 10 S. E. 449, 6 L. R. A. 190, it was held that a machinist employed to keep machinery in good order takes the risk of discovering its condition at the time he attempts to repair it. Said the court, speaking by Chief Justice Bleckley:

"While it is the duty of a master to furnish his servant safe machinery for use, he is under no duty to furnish his machinist with safe machinery to be repaired, or to keep it safe whilst repairs are in progress. Precisely because it is unsafe for use, repairs are often necessary. The physician might as well insist on having a well patient to be treated and cured, as the machinist to have sound and safe machinery to be repaired."

In Bedford Belt Ry. Co. v. Brown, 142 Ind. 659, 42 N. E. 359, the accident resulted from the slipping of a wedge in the track on a railroad bridge in process of construction. It was held that the rule of safe appliances did not apply. "The rule may be broadly stated that the master is never liable for failing to supply a safe place for the servant to work when the work consists in making safe the place and the condition of which he complains." 142 Ind. 666, 42 N. E. 361.

But it is contended that Reed could not be held to have assumed the risk of the elevator still being in need of repair, after the broken cable had been replaced and Antone had stated that the only thing still to be done was to put on the stops; that Reed had a right to rely on Antone, and did rely on him, and simply followed his orders, and was not bound to examine and ascertain for himself the real condition of the elevator. But, when Reed went to the elevator with Antone to repair it and put it in working order, he knew it was out of repair, and he assumed the risk of helping Antone repair it. He knew, when he went to work with Antone upon the elevator, that it was not a safe elevator, that it needed to be repaired, and that Antone, with his help, must put it in repair. In doing this work of repair, Reed became a fellow servant of Antone, and he assumed the risks resulting from that relation. American Bridge Co. v. Seeds, 144 Fed. 605, 75 C. C. A. 407; Kinnear Mfg. Co. v. Carlisle, 152 Fed. 933.[1] If Antone was negligent, and as a result made a mistake, Reed could not hold the master responsible for that mistake in thinking the defect was repaired when in fact it was not. The master had a right, after calling upon Antone to repair the elevator, to rely upon Antone doing his duty, and not reporting or treating the elevator as safe until it was in fact repaired and in proper working order. That was what Antone was hired to do, was ordered to do, and had assumed the risk of doing, and Reed, who was hired to assist him, assumed the same risks; each taking upon himself the risk of repairing the broken elevator, and also the risk of the negligence of his fellow servant while the work was going on. Neither Antone nor Reed could complain of the elevator being defective, inasmuch as that very thing was the cause of their being there, and they undertook to set it right, being paid for the risk they ran and voluntarily incurring it. Frye, L. J., 18 L. R. Q. B. Div. 702.

The judgment is affirmed.

[1] 82 C. C. A. 81.

Digitized by Google

(153 Fed. 362.)

OHIO VALLEY BANK CO. v. SWITZER et al.

(Circuit Court of Appeals, Sixth Circuit. May 15, 1907.)

No. 1,653.

BANKRUPTCY—ORDER ON CLAIM FOR ATTORNEY'S FEES—MODE OF REVIEW.

An order of a court of bankruptcy passing upon the claim of a creditor for the allowance of counsel fees and expenses incurred in contesting claims and prosecuting suits on behalf of the estate is not one allowing or rejecting a "debt or claim" against the estate within the meaning of Bankr. Act July 1, 1898, c. 541, § 25a (3), 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], and appealable thereunder, but is an administrative order reviewable only on petition to revise in matter of law under section 24b.

Appeal from the District Court of the United States for the Eastern Division of the Southern District of Ohio.

A. L. Roadarmour, for appellant.

Hollis C. Johnston and E. D. Davis, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The controversy brought up on this appeal arose in the matter of the bankruptcy of Christian C. Mack upon a petition of the appellant, a principal creditor of the bankrupt. for the allowance of attorney's fees and expenses incurred by it in contesting claims of other parties who claimed to be creditors, and in proceedings to recover assets. The appellant alleged in its petition that these contests and recoveries were made by its own efforts in default of action by the trustees, and were successful in largely augmenting the estate. It claimed before the referee an allowance of $1,800 for attorney's fees and $1,200 for other costs and expenses. The referee allowed the petitioner $750 only. The petitioner, feeling aggrieved, caused the matter to be certified to the district judge for review. The district judge confirmed the action of the referee. Thereupon the petitioner filed an assignment of errors and a petition for the allowance of an appeal. This petition stated that it had undertaken to prosecute (contest, apparently was meant) claims against the estate with the consent of the trustees, had expended large sums of money, which had been in large part disallowed, and that the District Court had made an order allowing it to appeal from the judgment. The appeal was allowed, bond given, and citation issued and served. On the argument here the court failed to notice that the case came up by appeal, and not on a petition for review. But on taking the record in hand for further consideration we find that we are without jurisdiction; for the proceeding in the District Court was an administrative proceeding in the bankruptcy matter, and was neither a controversy arising in a bankruptcy proceeding within the meaning of section 24a of the bankrupt act of July 1, 1898 (30 Stat. 552, c. 541 [U. S. Comp. St. 1901, p. 3431]), nor the rejection of a claim against the estate under section 25a (3) of the act.

It has been already decided by this court in Davidson v. Friedman, 140 Fed. 853, 72 C. C. A. 553, that such a claim as this is not a claim such as is intended by section 25a (3) from the disallowance of which

Digitized by Google

an appeal is given; and that the question of the allowance of such a claim is a question relating to the administration of the estate, and reviewable only under section 24b of the act upon a petition for review. We have therefore no alternative but to dismiss the appeal.

We must not be understood, however, as suggesting a remedy by a proceeding under section 24b, for it would seem that the controversy here is over a question of fact, while subdivision "a" of section 24 authorizes only the revision of matters of law.

Appeal dismissed, with costs.

(153 Fed. 363.)

In re WEINREB et al.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 252.

BANKRUPTCY—DISCHARGE—REFUSAL TO ANSWER MATERIAL QUESTIONS.

Under Bankr. Act July 1, 1898, c. 541, § 14b (6), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]), which makes it a ground for refusing a discharge that the bankrupt "in the course of the proceedings in bankruptcy refused * * * to answer any material question approved by the court," no more formal approval is required from the referee than the overruling of objections, if any are made, and the allowance of the questions, and the refusal of a bankrupt on his examination to answer a question as to what was done with a large sum of money drawn by him from the bank a short time before the bankruptcy, is sufficient to warrant the refusal of a discharge, although after such objection to the discharge was made he offered to answer the question.

Appeal from the District Court of the United States for the Southern District of New York.

See 146 Fed. 243, 76 C. C. A. 609.

Max J. Kohler and Joel M. Marx, for appellant.

Joseph Rosenzweig, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The district judge refused discharge under the sixth subdivision of section 14b of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]), which provides for a discharge unless it appears that the bankrupt "in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

The question related to a payment of $18,200 in cash which the bankrupts alleged they had made to a person to whom they claim that they were indebted on open account. Manifestly it was material. It was put to Weinreb on examination before the referee on January 27, 1904. No objection was made to it, but he refused to answer, on the ground that it would tend to degrade and incriminate him. The same question was put to Merker on February 17, 1904, under the same circumstances and with the same result. On March 15th each

Digitized by Google

bankrupt was again asked the same question. Objection was interposed on the ground that it was "incompetent, irrelevant, and immaterial," but the objection was overruled by the referee and the question allowed. Each bankrupt thereupon refused to answer, on the ground that it might tend to incriminate him. On March 14th specifications in opposition to discharge were filed; one of such specifications being the refusal to answer this question. Thereafter at a hearing before the referee on April 5, 1904, without notice to the objecting creditors, and in the absence of their counsel, the bankrupts signified their willingness to answer said question and gave the name of the person inquired about. Under these circumstances, we concur with the district judge in the conclusion that their original refusal was sufficient ground for denying discharge. We do not assent to the appellant's contention that any more formal action than the overruling of objections (if any are made) and the allowance of the question is required from the referee. Upon hearing on application for discharge, the bankrupt has the opportunity to argue before the judge that the question put to him was not material, and his rights are thus as fully protected as if the referee should certify the objections to the question to the court in the first instance.

The order is affirmed.

(153 Fed. 364.)

THE FOLMINA.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 193.

1. SHIPPING—DAMAGE TO CARGO—BURDEN OF PROOF AS TO SEA PERILS.

Under a bill of lading which exempts the vessel from liability for injury to cargo through perils of the sea, where damage was caused by sea water, the burden rests on the vessel to show sufficient stress of weather to warrant the inference that such water found access to the cargo through a peril of the sea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 481. Loss by perils of the sea, see note to The Dunbritton, 19 C. C. A. 465; Southerland-Innes Co. v. Thynas, 64 C. C. A. 118.]

2. SAME.

A decree dismissing a libel to recover for damage to cargo affirmed where the evidence left it uncertain whether the damage was caused by sea water or by sweat and heat, and the bill of lading exempted the vessel from liability for injury caused by perils of the sea or from sweat or decay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 481, 484.]

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, dismissing a libel, brought to recover for cargo damage against the Steamship Folmina. The opinion below is reported in (D. C.) 143 Fed. 636. The steamship sailed from Kobe, Japan, for New York with No. 3 lower hold filled with rice in bags. During discharge the rice on the starboard side was found damaged. The area of injury was downward from the first six tiers of bags to the bottom of the hold which was dry, forward

Digitized by Google

from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. The damage was caused by water and consequent heat. The bill of lading exempted the carrier from "the act of God * * * loss or damage from * * * explosion, heat or fire on board * * * risk of craft or hulk or transshipment and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature or kind." It further provided that the ship "is not liable for * * * sweat, rust, decay, vermin, rain, spray." It is manifest upon the proofs, and no one disputes, that the damage was caused either by sweat and heat, or by sea water and consequent heat. The district judge found the evidence not sufficient to satisfy him as to which of these two causes was responsible for the damage. He exonerated the ship because she had "stipulated against damage from sea water," and also against damage from heat and sweat. He says: "If the injurious cause was sea water, its means of access is beyond the bounds of human research or discovery, and the law should not require the performance of impossibilities as a condition of a carrier's exculpation. Indeed, the impossibility of discovering how the sea water could enter a sound and properly navigated ship strongly aids the evidence that it did not enter. But that is left undecided. If the injury was the result of sweating, heat, or natural decay due to the inherent and natural condition of the goods, the ship is not liable, unless the act or omission of the owner or his servants intervened to incite or to aid such cause, which is not the case. If the injury arose from sea water, without the carrier's fault, he is released by the stipulation provided he shows the fact. * * * When the carrier shows that a sea peril, in this case sea water, within the exception of the bill of lading did the damage, the burden is upon the shipper to prove that the carrier's negligence intervened."

F. M. Brown and Butler, Notman & Mynderse, for appellants.

J. P. Kirlin, John M. Woolsey, and Convers & Kirlin, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The opinions of the three members of the court upon the questions presented in this case are so discordant that no good purpose will be served by any detailed statements of the reasons by which they reach their several conclusions. It will be sufficient to indicate what those conclusions are.

Evidently the conclusion of the district judge was arrived at by first determining upon whom the burden of proof rested; and it would seem that in determining that preliminary question he assumed that the bill of lading stipulated against damage by "sweat" and damage by "sea water." The stipulations, however, are in fact against damage by "sweat" and damage by "perils [dangers and accidents] of the seas." This court recently considered the question of burden of proof in the case of the Patria, where the exceptions were "perils of the seas" and "decay of any kind"; and expressed itself as follows:

"It is, no doubt, the rule, as appellant contends, that, when the damage is manifestly of the sort excepted, the ship is under no obligation to show the promoting cause. To illustrate: If the exception is 'damage caused by peril of the sea,' and the cargo is landed drenched with salt water, it will be for the ship to show that the salt water found access to the cargo through a peril of the sea; but, if the exception is 'damage by breakage,' and the article arrives broken, the ship is not required to show how it got broken, although the libelant may show that negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and, showing that, may recover. If the sole damage to the cargo in the case at bar were manifestly decay, and the language of the exception were, as the respondent states in his brief, 'for decay caused by inherent defect,' the ship would have the burden of showing that the decay was caused by inherent defect. If, however, the sole damage

Digitized by Google

was manifestly decay, and the language of the exception were, as given in the bill of lading, 'not responsible for damages occasioned by decay of any kind,' the appellant would be right in his contention, and, the cause of the decay not being shown to be negligence on the part of the ship, the libel should be dismissed." The Patria, 132 Fed. 971, 972, 68 C. C. A. 397.

One member of the court as at present constituted is of the opinion that, where the damage is caused by sea water, the statement of the rule as given in the above excerpt is too broad; that under the English authorities (Hamilton v. Pandorf, 16 Q. B. D. 633, 12 App. Cas. 523, and subsequent cases) the shipowner is relieved when he shows that the damage is caused by sea water and there is no evidence that any fault, negligence, or unseaworthiness of the ship allowed it to enter; and that the American cases (Hooper v. Rathbone, Taney 519, Fed. Cas. No. 6,676; The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234) are in accord with this construction. Therefore, although not satisfied by the proofs that the damage was caused by sweat, he votes to affirm.

The other two judges adhere to the rule laid down in The Patria, but one of them is satisfied that the weight of evidence is to the effect that the damage was not caused by sea water but by sweat. Therefore he votes to affirm. The other judge is not persuaded by the evidence to a finding that the damage was caused by sweat, and believes that sea water was the cause. He does not think that, under the decision in The Patria Case, the shipowner need show just how the water got in, but that he must show sufficient stress of weather to warrant the inference that it came in because of the action of external causes. And, there being no evidence of such stress of weather, he votes to reverse.

The result is that the decree is affirmed, with costs.

NOTE.—Subsequently a reargument was ordered, and the question as to burden of proof was certified to the Supreme Court.

(153 Fed. 366.)

THE FERGUSON.

(Circuit Court of Appeals, Second Circuit. April 4, 1907.)

No. 218.

TOWAGE—TOWING SHIP FROM DRY DOCK—COLLISION WITH DOCK.

Evidence considered, and *held* to establish the contention of a libelant that a collision between a steamship and a dry dock from which the ship was being towed by a tug was due to the fault of the tug in hauling the stern too far to port and against the side of the dock, because of a miscalculation of the effect of a high wind blowing from that side.

Appeal from the District Court of the United States for the Eastern District of New York.

C. S. Haight, Clarence Bishop Smith, and Wheeler, Cortis & Haight, for appellant.

C. C. Burlingham and Wing, Putnam & Burlingham, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

Digitized by Google

TOWNSEND, Circuit Judge. The judge who heard and saw the witnesses in this cause has indicated in his opinion with characteristic frankness that the question of liability was an open one in view of the unsatisfactory, contradictory, and inconclusive character of the testimony. He says:

"The result of a careful consideration is that the evidence does not show with preponderating clearness that the master of the tug did miscalculate the force of the wind and haul his tug too far and forcibly to the westward and thereby produce the accident. A too free slacking of the port bow lines at an earlier stage of the removal would produce the same result."

In these circumstances, we have felt constrained to review all the evidence independently of the conclusions reached by the court below.

The situation presented was one where, while a steamship was being hauled out of a dry dock by a tug, she swung over in the teeth of a heavy opposing wind until her port quarter collided with the port side of the dock. The only explanation vouchsafed by the claimant on behalf of the tug was that the port bow lines on the steamship, which are usually kept taut in such circumstances during the operation of hauling out, were on this occasion slacked or cast off, with the result that the bow swung to starboard and caused the stern to swing to port and strike the dock.

There are various persuasive answers to this contention, namely:

1. There were two port bow lines out. Two witnesses testified to the slacking of one port bow line. One of them, as the court below says, "testifies that the port bow line was slacked so as to let the bow go to starboard, but he did not see the port side of the vessel go to port sufficiently to collide with the dock, and seems to admit that the slacking of the line could not have caused the collision. His evidence strengthens the existing uncertainty by adding features to the happening peculiar to his own observation." The other witness saw only one port bow line out and only one port bow line slacked.

2. The evidence is to the effect that, where there are two lines, both are not ordinarily slacked at the same time, but that it is customary to hold on to one line while the other is eased. There is some evidence that this custom was followed on this occasion. Claimant's witness Devereaux testifies that, when they let go the port bow line, her bow was then about 50 feet in the dock; that he thought one of the bow lines was taken in just after she floated and started out, then they worked the forward bow line, which was the only bow line out, down the dock; that he would not swear that, when he saw line X loosed off and signaled to stop, the tug that line Y was not in place, but that, if it was there, there was no strain on it at the time because all the strain was on line X, that was the line that held the ship. He further testified that it was customary to carry one line down the dock and make that fast, and then take the line farthest forward and lead that down and make that fast, and so work the ship out; that the tug stopped immediately upon signal from him; that the stern of the steamship was 350 feet out of the dock when that happened; that he stopped her there because he saw her coming over against the other part of the dock, the starboard side of the dry dock, and because the towboat pulling on the quarter would swing her bow harder against the dock; and

Digitized by Google

that when he ordered the boat to stop when she was all out but 50 feet, because they were slacking off the port bow line, that line had been made fast on the end of the dock or pretty near it.

3. With the heavy wind blowing broadside against the port side of the steamship, it would seem that any slacking of the port bow line which would have been sufficient to swing the stern against the dock would have caused the bow to swing so far to starboard as to collide with the starboard side of the dock or come close to it. The bow did not strike the dock, and all the witnesses agree that the swing of the bow to starboard was a very slight one. We do not agree with the statement of the witnesses that the letting go of the port bow lines would cause the stern to swing to port as on a pivot if the tug was hauling the steamship straight out or nearly so. But, even if this theory be accepted, the fact that the bow did not swing further over toward or against the dock indicates that no such slacking occurred.

4. If, on the other hand, the master of the tug miscalculated the force of the wind and hauled the stern at an angle too far to port, the accident would have occurred exactly as it did. Rodan, the master of the tug, testified that if the port bow line had been held perfectly tight, and he had pulled in the direction of the solid line (a line angling to port) at the stern, he would have pulled the whole ship right out against the side of the dock; that the tendency of the wind was to swing the whole ship bodily over toward the starboard side of the dock; that it would not tend to swing the stern in more than the bow, if she was properly taken care of; and that, if she was there without any ropes on, the whole ship would have to swing evenly to starboard under the influence of the wind blowing so hard. He further testified that the stern of the steamer did swing over to the left; that she fell back again afterwards to the right, and went back in the middle of the dock again because the wind shoved her right off. That the accident was caused by the fault of the tug in hauling the stern of the steamship too far to port is further indicated by the evidence that the tug started out at full speed, and at an angle to the dock, in order to overcome the heavy wind.

We conclude, for the reasons stated above, that the evidence conclusively shows that the slacking of the bow line alone could not have caused the collision, and, in view of the other evidence discussed, we are of the opinion that the negligence of the tug was the sole cause of the collision.

The decree is reversed, with costs, and the cause is remanded to the court below, with instructions to enter a decree in accordance with this opinion.

Digitized by Google

(153 Fed. 369.)

MURRAY v. ORR & LOCKETT HARDWARE CO.

(Circuit Court of Appeals, Seventh Circuit. February 8, 1907. Rehearing Denied March 15, 1907.)

No. 1,342.

1. PATENTS—SUIT FOR INFRINGEMENT—ALLEGED NEW INFRINGEMENTS.
   Where a patent has been adjudged valid and infringed and an accounting ordered, it is the better practice to require the complainant to set up any alleged new infringements by supplemental bill, which can be disposed of and the order of reference modified as required, rather than to extend the accounting to devices which have not been adjudged to infringe and entail costs upon the parties which may prove unnecessary.

2. SAME—MATTERS CONCLUDED BY DECREE.
   It is not open to a defendant on the question of additional infringements after a decree adjudging infringement by one device to refer to the prior art to limit the scope of the invention to less than was found by the court on the original hearing.

3. SAME—INFRINGEMENT—STORE SERVICE LADDERS.
   The Murray patent, No. 442,531, for a store service ladder, *held* infringed.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Josiah McRoberts, for appellant.
John G. Elliott, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. In Murray v. Orr & Lockett Hardware Co., 138 Fed. 564, 71 C. C. A. 68, we held that Murray's patent for store service ladders, No. 442,531, issued December 9, 1890, was valid and infringed, reversed the decree which dismissed Murray's bill, and remanded the cause "with the direction to the Circuit Court to enter a decree in complainant's favor for an injunction and an accounting." In that record the only infringement proven was defendant's sale of certain ladders known as the "Columbia." The Circuit Court entered a decree in conformity to our mandate and referred the cause to a master to take an accounting. On the hearing before the master complainant claimed the right to inquire into defendant's sales not only of Columbia, but also of Nox-em-all, Bon-Ton, and Victor ladders, asserting that these last named, equally with the Columbia, infringed upon the invention as it was defined in our opinion. Defendant insisted that the accounting be limited to Columbias. Thereupon the master asked the Circuit Court for instructions. The instructions were to proceed with an accounting as to all of the types, leaving the question of infringement by defendant's sale of ladders other than Columbias open to determination by the court after receiving the report of the master. The master reported separate amounts as to each of the types. On a hearing of exceptions to the report the court entered a decree awarding to complainant certain sums on account of defendant's sales of Columbia and Nox-em-all ladders, and denying relief as to Bon-Ton and Victor ladders on the ground that they do not infringe. From the latter part of this decree complainant appeals.

Digitized by Google

When the order of reference was made, the only infringement established by the decree was defendant's sale of Columbia ladders. We think it is better and cleaner-cut practice to require a complainant to set up alleged new infringements in a supplemental bill. Thereupon, if it should be found that the additional types contain only colorable departures from the adjudged infringing type, the decree for an injunction and an accounting and the order of reference could be extended to cover them specifically; or, if the changes should appear to be so radical that the pending suit ought not to be cumbered and delayed by practically a new issue, the supplemental bill could be dismissed with leave to the complainant to begin an independent suit. We deem this the better practice, because, if an accounting before the master is extended to devices that have not been adjudged by the court to be infringements, a very great and unnecessary consumption of time and burden of costs may be imposed upon the parties.

The decree in this case, made after an accounting was had, adjudging that the Bon-Ton and Victor ladders are not infringements of the patent, is determinative of complainant's rights, and therefore has properly been brought here for review.

The essence of the invention was thus defined in our opinion:

"The Murray patent is a store ladder whose weight is wholly upon the rollers upon the floor or base shelf; the upper fastening being a loose one, by means of hooks intended solely to keep the ladder from tipping over. * * * This new thought in the art of ladder making—the utilizing of the man's weight to adjust the center of gravity—clearly was in the mind of the inventor (letters patent, line 40 et seq.), and finds embodiment in the mechanical means adapted to that end."

And we held defendant's Columbia ladder to be an infringement, because the upper fastening, though not strictly a hook, performed in the combination the office of Murray's hook by "yielding itself, without destroying its usefulness, to the balancing motion of the man's body," so that the ladder, with the weight wholly upon the bottom rollers, might be propelled laterally without friction. When either side of Murray's hook touches the guide-rod, there is a rubbing contact. When one side of the Columbia hook touches, there is a rubbing contact; when the other, a rolling contact. On both sides of the hooks of the Bon-Ton and Victor, which are identical throughout except that one runs on the floor and the other on the base shelf, rollers are provided. In these hooks, as in the Columbia's, there is sufficient looseness to enable defendant to utilize and defendant does utilize the essential features of Murray's invention as we defined it. It was not open to defendant on the question of additional infringements to refer to the prior art to limit the scope of the invention to less than we had found it to be in determining the infringement of the Columbia ladder. As the changes from the Columbia type are only colorable, the part of the decree that is questioned on this appeal must be reversed.

A suggestion was made with respect to our ascertaining from the master's report the amounts that should be adjudged on account of these additional infringements. We think the assessment should be made by the Circuit Court.

Decree reversed for further proceedings.

Digitized by Google

(153 Fed. 497.)

RICE v. NORFOLK & W. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. May 10, 1907.)

No. 1,634.

RAILROADS—REORGANIZATION—PURCHASING COMPANY—LIABILITY.

Rev. St. Ohio 1892, § 3300, authorizes any railroad company to purchase any part or all of a railroad constructed or in course of construction by another company, if the lines are continuous or connecting and not competing, and declares that after such purchase the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion, and operation of such railroad, and shall be subject to all the "duties, obligations and restrictions" of the former company. *Held*, that a claim for breach of a contract to transport plaintiff's stone for a specified rate existing against a railroad company, whose line was purchased by defendant, was not an "obligation" which defendant was bound to perform under such section; defendant never having agreed to assume such liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 399, 400.]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

A. T. Holcomb and Albert D. Alcorn, for plaintiff in error.
Oscar W. Newman, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The validity of the claim sued on in this case depends upon the construction of section 3300 of the Revised Statutes of Ohio of 1892, regulating the purchase by a railroad company of a line of road of another company, continuous or connected, but not competing.

The suit was brought by the plaintiff in error, Samuel L. Rice, against the Norfolk & Western Railway Company, on a contract made by Rice with the Cincinnati, Portsmouth & Virginia Railroad Company, the predecessor of the Norfolk & Western Railway Company, by which Rice agreed to purchase and operate a stone crusher on the line of the road near Newport, Ohio, and the railroad company agreed to carry the crushed stone to points in Cincinnati, Ohio, at rates fixed by the contract. This contract was entered into on October 22, 1898. It is alleged in the petition that Rice expended $9,390.83 in the purchase and establishment of the stone crushing plant; that for a short time the Cincinnati, Portsmouth & Virginia Railroad Company complied with the contract, but on or about April 1, 1900, without any cause, and against the protest of Rice, refused to further transport the crushed stone at the rates fixed in the contract, and demanded rates in excess thereof, which Rice was compelled to pay under protest, the overcharges amounting altogether to about $1,110.17.

After this, on October 12, 1901, the defendant, the Norfolk & Western Railway Company, purchased the railroad property and franchises of the Cincinnati, Portsmouth & Virginia Railroad Company, including the line of road from Sciotoville to Cincinnati, Ohio, through the

Digitized by Google

counties of Scioto, Adams, Brown, Clermont, and Hamilton, on which was located the stone crushing plant of Rice already mentioned.

The suit was instituted August 4, 1903, by Rice, against the Norfolk & Western Railway Company, to recover the damages, claimed to be $10,000, caused by the breach of this stone crushing contract by the Cincinnati, Portsmouth & Virginia Railroad Company, and the overcharges, amounting to $1,110.17, alleged to have been collected under it by the latter company.

The purchase of this railroad was made under authority of section 3300 of the Revised Statutes of Ohio of 1892, which provides:

"Any company may * * * purchase any part or all of a railroad constructed, or in course of construction, or by another company, if the lines of road of such company are continuous or connected and not competing, upon such terms as may be agreed upon between the companies; and after such purchase, the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion and operation of such railroad, * * * including the power to acquire and appropriate property therefor, and shall be subject to all the duties, obligations and restrictions of said company," etc.

In the deed of conveyance of this railroad, there was included in the description of the property conveyed "all cash on hand, contracts, book accounts, bills receivable and assets of every kind," etc.

The plaintiff Rice takes the position that among the "contracts" mentioned and intended to be embraced in the deed of conveyance of the railroad property, along with "cash on hand," "book accounts," "bills receivable," and "other assets," was included his contract with the Cincinnati, Portsmouth & Virginia Railroad Company, and that section 3300 at the same time it vested in the Norfolk & Western Railway Company all the rights and powers in respect to the location, construction, completion, and operation of the railroad, and its branches, owned by the selling company, also subjected the purchasing company to all the "duties, obligations and restrictions" imposed by this stone crushing contract upon the selling company.

To determine this requires a construction of section 3300, and especially the words just quoted.

The original of section 3300 was enacted May 1, 1852, as section 24 of the act to provide for the creation and regulation of incorporated companies in the state of Ohio. It provided that any railroad company might aid another in the construction of its road for the purpose of forming a connection of the two roads, or might lease or purchase the road of another company, if the lines of road should be continuous or connecting, upon such terms and conditions as might be agreed upon between said companies, but no aid should be furnished or purchase perfected until the question should be submitted to and approved by the stockholders of the companies.

As thus enacted, the section came before the Supreme Court of Ohio in Campbell v. Marietta & Cincinnati R. R. Company, 23 Ohio St. 168, 188, in which the authority exercised in the purchase and operation by the Marietta & Cincinnati Railroad Company, of its branch line from Hampden to Portsmouth, Ohio, was in dispute. The court, speaking by Judge McIlvaine, said:

Digitized by Google

"This act is entirely silent as to the terms upon which the purchase road may be maintained and operated by the purchasing company. Indeed, it does not, in terms, authorize the purchasing company to maintain and operate the purchased road at all; but such authority must be implied from the grant of power to purchase, for the reason that the Legislature certainly did not intend that the purchased road should cease to be operated as a public highway. And inasmuch as no new mode of use or power of control was expressly provided, and as the power of the purchasing company to demand and receive tolls, as conferred by its own charter, is limited to roads constructed under the charter, it must be inferred that the Legislature intended the purchasing company to succeed to the powers and privileges of the vending company, and to none other."

The limitations which followed the powers of the purchasing company thus restricted are expressed in the second paragraph of the syllabus:

"(2) Where the railroad of one company is purchased by another railroad company, in pursuance of a statute authorizing the purchase, in the absence of any provision of law to the contrary, the road passes to the purchasing company subject to the same restrictions and limitations as to rates chargeable for transportation as attached to it in the hands of the vendor." 23 Ohio St. p. 168.

Section 24 of the act of May 1, 1852 (50 Ohio Laws, p. 281), as thus construed, was amended by the act of April 15, 1873 (70 Ohio Laws, p. 129), by the addition of certain sections defining the rights of dissenting stockholders, and passed into the Revised Statutes as section 3300, where it was amended March 14, 1882 (79 Ohio Laws, p. 35), so as to assume its following form, which has remained unchanged:

"Sec. 3300. Any company may aid another in the construction of its road, by means of subscription to the capital stock of such company, or otherwise, for the purpose of forming a connection of the roads of the companies, when the road of the company so aided does not and will not, when constructed, form a competing line; any company may lease or purchase any part or all of a railroad constructed, or in course of construction, by another company, if the lines of road of such companies are continuous or connected and not competing, upon such terms as may be agreed upon between the companies; and after such purchase the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion and operation of such railroad, and of branches thereto of the company from which it purchased said railroad, including the power to acquire and appropriate property therefor, and shall be subject to all the duties, obligations and restrictions of said company; and any two or more companies whose lines are connected and not competing, may enter into any arrangement for their common benefit consistent with and calculated to promote the objects for which they were created."

It is the contention of counsel for the defendant in error that the provision that the purchasing company "shall be subject to all the duties, obligations and restrictions of said company," referring to the selling company, is merely an expression in statutory form of the rule announced in the case of Campbell v. Marietta & Cincinnati Railroad Company, 23 Ohio St. 168, and relates only to the duties, obligations, and restrictions of a public nature, imposed by law, and does not embrace obligations created by contract like that entered into between Rice and the Cincinnati, Portsmouth & Virginia Railroad Company, which could have no binding force upon the purchasing company, un-

Digitized by Google

less a special provision was made for their continuance in the contract for the purchase of the road. This was the view taken by the court below.

It would seem to be supported by the decision in Railroad Co. v. Hinsdale, 45 Ohio St. 556, 557, 572, 15 N. E. 665, in which it was held that neither section 3300 nor section 3409, of the Revised Statutes of Ohio of 1892 conferred authority to sell and transfer a stock subscription made by the company whose road was purchased.

An examination of the Revised Statutes of Ohio of 1892 discloses provisions relating to the sale of railroad properties which may throw light upon the meaning of the provision under consideration.

The general rule is that the owner of property, whether an individual or a corporation, has a right to sell and dispose of it in good faith and for a valuable consideration.

"It is true that, ordinarily, a creditor has no right that will interfere with that of his debtor to sell and dispose of his property for a valuable consideration, unless he has taken the precaution to acquire some lien upon it, by mortgage or otherwise, as a security in his own behalf. As a rule, the right of an unsecured creditor is confined to the personal obligation and the undisposed of property of his debtor; still it is not strictly accurate to say that such creditor has no claim upon the property of his debtor, for in one sense, all the property owned by a debtor, unless exempt by statute from sale on execution, is subject to the claims of his creditors, and he cannot dispose of it unless for a valuable consideration, so as to defeat this right." Compton v. Railroad Co., 45 Ohio St. 592, 614, 16 N. E. 110, 18 N. E. 380.

The above extract from the opinion of Judge Minshall, is preliminary to the holding that under the act of April 10, 1856 (1 Swan & C. Rev. St. p. 327, now section 3384 et seq., of the Revised Statutes of Ohio), the effect of the Ohio act for the consolidation of railroads was to merge the old corporations into the new one, which took their place, succeeded to their property, and assumed their liabilities. Shields v. Ohio, 95 U. S. 319, 21 L. Ed. 357; Railway Co. v. Georgia, 98 U. S. 359, 25 L. Ed. 185; Wabash, etc., Ry. Co. v. Ham, 114 U. S. 587, 595, 5 Sup. Ct. 1081, 29 L. Ed. 235; Compton v. Railway Co., 45 Ohio St. 592, 613, 16 N. E. 110, 18 N. E. 380.

The interpretation thus placed upon these Ohio statutes was the result of the express language used. The original language, preserved in section 3384, provided that upon the consolidation:

"All rights of creditors, and all liens upon the property of either of said corporations (meaning the constituent companies), shall be preserved unimpaired, and the respective corporations may be deemed to be in existence to preserve the same; and all debts, liabilities and duties of either of said companies, shall thenceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been contracted by it." Compton v. Railway Co., 45 Ohio St. 613, 16 N. E. 110, 18 N. E. 380; Rev. St. Ohio 1892, § 3384.

This express provision was held not to be applicable in the case of Railroad Co. v. Hinsdale, 45 Ohio St. 556, 15 N. E. 665, and for lack of it neither section 3300 nor section 3409 of the Revised Statutes of 1892 was deemed to confer authority to sell and transfer the stock subscriptions of a selling company to a purchasing one.

Digitized by Google

Again, section 3396, which relates to the reorganization of railroad companies, after defining the powers of the new company, and providing that all the franchises and property of the reorganized company shall be held and disposed of for the use and benefit of the creditors and stockholders of such company, contains the following language:

"And shall be in no wise chargeable in respect to any debt, liability or claim of any creditor or stockholder which subsisted prior to the sale and reorganization herein provided for."

Again, section 3426, which relates to the purchase of railroads at judicial sale, after providing for the incorporation of the purchasers and the transfer to them of the railroad and property purchased at the sale, contains the following language:

"And in the operation and maintenance of such railroad, the said corporation shall be entitled to all the rights, and subject to all the privileges and restrictions imposed upon railroad companies by the general laws of this state."

This language, it seems, is a substantial equivalent for that contained in section 3300; the "duties, obligations and restrictions of said company" being those "imposed upon railroad companies by the general laws of this state."

The cases of New Bedford R. R. Co. v. Old Colony R. R. Co., 120 Mass. 397, Berry v. K. C. Ft. S. & M. R. R. Co., 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371, Montgomery & West Point R. R. Co. v. Boring, 51 Ga. 582, and Warren v. Mobile & Montgomery R. R. Co., 49 Ala. 582, all turn upon statutes whose language differs materially from that of the Ohio law.

In the Massachusetts case, by a special act one railroad was authorized to "purchase the rights, franchises and property" of another, and the latter, upon such purchase, was given power to convey "its franchises and property, and all the rights, easements, privileges and powers" granted to it, to the purchasing company, which upon such conveyance, was "to have, and enjoy all the rights, powers, privileges, easements, franchises and property," of the selling company, "and be subject to all the duties, liabilities, obligations and restrictions to which said last-named corporation may be subject." The Supreme Court of Massachusetts held that this language was broad enough to place the purchasing in all respects in the position of the selling corporation, upon the making of the conveyance. "It is equivalent to an amalgamation of the two; all the franchises, privileges, and powers are transferred without reservation; not merely the franchise to own and manage a railroad, but the franchise of being a body politic, with rights of succession, of acquiring, holding, and conveying property, and of suing and being sued by its corporate name. It puts out of the reach of creditors all property liable to attachment to satisfy claims, either in contract or tort. It practically terminates the corporate existence of the selling corporation," etc. 120 Mass. 400.

This is not true of section 3300 of the Ohio law. It does not provide for the sale of a railroad company, with all its franchises and property, but for the lease or sale of the whole or any part of a railroad constructed or in course of construction. The only franchises vested in the purchasing company are "the rights and powers in re-

Digitized by Google

spect to the location, construction, completion and operation of such railroad." It is perfectly obvious that the lease or sale of a part of a railroad under this provision would not necessarily terminate the existence of the selling company. It might, or it might not. The reasoning of the Massachusetts case does not apply here.

The statutes on which the other cases turn present even more marked differences.

In conclusion, we may observe that the stone crushing contract between Rice and the Cincinnati, Portsmouth & Virginia Railroad Company terminated before the purchase of the railroad of the latter company by the Norfolk & Western Railway Company. The amended petition claims damages for its breach. This is not a claim that the contract is or was binding originally upon the purchasing company. The claim is limited to the liability on the part of the latter for the damages caused by the selling company through a breach of its own contract with Rice. But it is to be observed that there is no averment and no claim that the purchasing company agreed to assume any such liability on the part of the selling company. Nor is there any attempt to charge the purchasing company with fraud in the disposition of the assets it obtained through the purchase. That remedy, the pursuit of the assets of the selling company, would only naturally follow an attempt to collect the claim against the selling company itself.

The judgment is affirmed.

NOTE.—The following is the opinion of Cochran, District Judge, on demurrer to amended petition:

COCHRAN, District Judge. This cause is submitted on demurrer to the amended petition. The liability of the defendant for the claims set forth in said pleading against the Cincinnati, Portsmouth & Virginia Railroad Company is based upon section 3300 of the Revised Statutes of Ohio and upon the meaning to be given to the word "obligations" contained therein. There is no such liability, unless said word is construed to embrace contract obligations. I do not think it can be so construed. It has reference solely to obligations imposed by law other than through contracts. Its meaning is affected to a certain extent by its companion words "duties" and "restrictions." It is not urged that they have reference to duties or restrictions arising out of contract. The statute not only renders the purchasing company subject to certain things, it also passes certain things to it, "the rights and powers in respect to the location, construction, completion and operation of such railroad and of branches thereto of the company from which it purchased said railroad, including the power to acquire and appropriate property therefor." The rights and powers which the statute thus passes are not rights and powers arising out of contracts, but such as are conferred by law otherwise than through contracts. As to whether the purchasing company is to be subject to other things, or other things are to pass to it upon the transfer, that is left to be determined by the contract between the two companies. The section provides that the transfer is to be "upon such terms as may be agreed upon between the companies."

This view of this statute is confirmed by a consideration of other statutes. Section 3426b relating to the purchase of railroads at judicial sale and the incorporation of the purchasers, provides that, "in the operation and maintenance of such railroad, the said corporation shall be entitled to all the rights and be subject to all the obligations and restrictions imposed upon the railroad companies by the general laws of this state."

Here it is plain that it is not rights and obligations arising out of contracts that is had in view, but such as are imposed by the general laws of the state. The absence here of the explanatory clause "imposed upon railroad companies

Digitized by Google

by the general laws of this state" does not differentiate that statute from this.

Again, section 3384, relating to consolidation of railroad companies, provides that "all debts, liabilities and duties of either of said companies shall thenceforth attach to the new company and be enforced against it to the extent as if such debts, liabilities and duties had been contracted by it"; and section 3396, relating to the reorganization of railroad companies, after defining the powers of the new company, provides that it "shall be in no wise chargeable in respect to any debt, liability or claim of any creditor or stockholder which subsisted prior to the sale and reorganization herein provided for."

These statutes show that when the Legislature had in view contract obligations it used apt words to describe them so as to leave no doubt as to its having them in mind.

The case of New Bedford Ry. Co. v. Old Colony Ry., 120 Mass. 397, can have no application here, because the statute there is different and was without other statutes having a bearing on its construction.

I do not mean to be understood as holding that, in case of a purchase by one railroad company of the property of another railroad company, under section 3300, a contract obligation of the seller may not pass to or against the purchaser in the absence of a provision in the contract between the two companies. It may pass if it possesses the characteristics of a covenant which runs with the land. But the contract obligations sought to be enforced herein against defendant are not of that character, nor is it claimed that they are.

There is room to hold that the amended petition is bad, even if the word "obligations" in section 3300 be construed to exclude contract obligations. The sale and purchase which it authorizes is conditional, to wit, "if the lines of road of such companies are continuous or connecting and not competing." It is nowhere alleged in plaintiff's pleadings that such condition existed in this case.

The demurrer is sustained.

(153 Fed. 503.)

ATCHISON, T. & S. F. RY. CO. et al. v. HURLEY et al.

(Circuit Court of Appeals, Eighth Circuit. March 20, 1907.)

No. 2,424.

1. BANKRUPTCY—NATURE OF PROCEEDINGS—PROTECTION OF EQUITABLE RIGHTS.

   The administration and distribution of the property of bankrupts is a proceeding in equity, and should be conducted on broad equitable lines, with a view of recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal or equitable or both.

2. SAME.

   A trustee in bankruptcy stands in the shoes of the bankrupt, and whatever rights a third party had against the property of the bankrupt before adjudication that party, in the absence of fraud or fixed liens created by state statutes in favor of others, has against his estate in bankruptcy.

3. FRAUDS, STATUTE OF—OPERATION OF STATUTE—CONTRACT AS GROUND FOR EQUITABLE RELIEF.

   Equity will not permit the statute of frauds to be invoked in favor of a party who has not performed his oral undertaking against one who, at his invitation and in reliance on his promise, has expended money and changed his situation.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 343.]

4. BANKRUPTCY—ASSUMPTION OF CONTRACT BY TRUSTEE.

   While trustees in bankruptcy are not bound to accept property or take over contracts which are onerous and unprofitable, they are required to elect whether to assume an existing executory contract and to continue its performance and ultimately dispose of it for the benefit of the estate, or to renounce it, and leave the injured party to such legal remedies for the breach as the case affords. If they elect to assume a contract, they

Digitized by Google

take it cum onere, as the bankrupt held it, subject to all of its provisions and conditions, and any valid modification of a written contract which may have been made by the bankrupt before adjudication, whether oral or in writing, and whether known or unknown to the trustees, will be binding upon them.

5. SAME—ENFORCEMENT OF EQUITABLE LIEN.

The owners of coal lands entered into a contract by which they leased the same, and by which the lessee engaged to supply to a railroad company all of the coal required on certain lines of its road at stated prices, the company on its part agreeing to pay for the coal delivered during each calendar month on the 15th of the following month. The railroad company was given power to terminate the lease on a failure of the lessee to comply with such contract, and the lease was made assignable only with its consent. The lease was assigned to a coal company which fulfilled the contract for a number of years. Becoming short of money, the railroad company advanced it money to meet its pay rolls under an oral agreement that the advances should be repaid by the subsequent delivery of coal under the contract. While still owing such advances, the coal company was adjudicated a bankrupt, and its receivers and subsequently its trustees continued to deliver coal under the contract, but refused to allow the advances. *Held*, that the oral agreement was in effect a waiver by the railroad company of its right to withhold payment until after delivery, and the advances constituted a payment in advance for coal to be delivered under the contract and a pledge of the coal when mined, which was valid as against the bankrupt and its trustees, who had assumed and continued performance of the contract.

Hook, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Kansas.

Robert Dunlap (Wm. R. Smith and Gardiner Lathrop, on the brief), for appellants.

John S. Dean, for appellees.

Before SANBORN, HOOK and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was an appeal from an order of a court of bankruptcy in the district of Kansas denying to the Atchison, Topeka & Santa Fé Railway Company a claim for a preference against the assets of Mt. Carmel Coal Company, bankrupt, or the alternative relief prayed for.

In 1896 the Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, as parties of the first part, Charles J. Devlin, as party of the second part, and the railway company, as party of the third part, entered into an agreement whereby the parties of the first part leased, for certain rents and royalties reserved, to Devlin for a term of three years certain coal lands situate in the state of Kansas with the right to mine coal therefrom, and the party of the second part agreed to sell and deliver to the railway company and the latter to buy from him daily all the coal required by it in the operation of certain of its lines of railroad in the state of Kansas, at the prices stated in the lease, the same to be paid for by the railway company on the 15th day of each month for all coal delivered to it during the preceding calendar month. Power was conferred upon the railway company to terminate the lease for failure by Devlin to perform any of

Digitized by Google

his undertakings, and the right to assign the lease was made subject to the consent of the railway company. Subsequently Devlin duly assigned to the Mt. Carmel Coal Company all his rights under the lease. By two successive agreements between the latter company and the other parties to the lease the same was extended with slight modification, unimportant now to mention, subject to all its original terms and conditions, until June, 1906. All the parties continued in the performance of their respective obligations until July, 1905, when the Mt. Carmel company was adjudicated a bankrupt. Receivers were duly appointed and authorized to conduct the business of the bankrupt in the usual course, until trustees should be chosen. The receivers and subsequently appointed trustees successively continued to operate the mines under orders of the court, and, in the language of the court below, "performed fully the terms of the contract as it is written with the coal company and the railway company." While the receivers were in charge the railway company and the two coal companies, the original lessors, filed their joint intervening petition, setting forth their relations with the bankrupt under the contract of 1896 as extended, their rights thereunder as already stated, and, in substance, that by an agreement had between them and the bankrupt the contract had been modified to the extent that the railway company had agreed that, without waiting until the 15th day of the month to make its payment for coal theretofore purchased, it would, in order to accommodate the bankrupt and enable it to pay off laborers and keep the mines going, make advance payments from time to time when necessary for those purposes for coal thereafter to be delivered under and pursuant to the terms of the contract; that pursuant to that agreement and for the purposes stated it had advanced $57,304.16 to the bankrupt with the understanding that it should be repaid by the delivery of coal under the contract, during the months of July and August, 1905; that the intervening bankruptcy proceedings of July 7th and the appointment of the receivers by the court alone prevented the bankrupt from carrying out its obligation and delivering the requisite coal to it.

The petitioners prayed that the lease be declared forfeited and void and the mines delivered back to them, or that the receivers be directed to deliver to the railway company the amount of coal so paid for in advance by it. The intervening petition was referred to a referee who heard the proof and reported unfavorably to granting any relief, and his report was afterwards confirmed by the district judge and the petition dismissed. The facts are not materially controverted.

The referee found and reported the amount claimed by the railway company, $57,304.16, had been advanced in the way shown by the proof, to enable the bankrupt to meet its pay rolls. He concluded as follows:

"I am unable to find any testimony indicating an intention to modify the written lease. There certainly was no express oral agreement to that effect. It is true the advances were to be paid, by money due the coal company for coal furnished the Santa Fé Company, and the money, instead of being paid under the terms of the written contract, would be kept to reimburse the Santa Fé Company for money advanced."

Digitized by Google

The court in reviewing the action of the referee said:

"True, at the time the sums of money were advanced it was no doubt contemplated and agreed by the parties that the bankrupt would repay the money by furnishing coal at the price of the coal measured in money by the terms of the contract and would furnish such coal in July and August as claimed, but at the time of the failure of the bankrupt the coal remained in the ground unmined."

From these facts the referee concluded that the verbal agreement was a separate independent parol contract, and had nothing to do with the original contract as evidenced by the lease, and the court in affirming the referee's conclusion observed as follows:

"I am of opinion that the transactions by which the money was advanced by the treasurer of the railway company to the bankrupt were completed transactions by reason of which the bankrupt became indebted to the railway company for so much money and that such transactions are wholly independent of and separate and apart from the originl contract between the parties. * * * The contracts under which the money was advanced created no lien upon any property for its repayment. * * *"

The supplemental agreement whereby provision was made for advance payments for coal to be thereafter delivered under the lease may or may not be properly called a modification of the original agreement. That is immaterial. What we are concerned about is not its name, but its meaning; that is, what was the intent and purpose of the parties in making it. In arriving at such intent and purpose we should consider the situation of the parties and the facts and circumstances surrounding them in the light of which, and to effect which, the supplemental agreement was made. The clear intent and purpose of the main contract, so far as the railway company is concerned, was to make a reliable provision in advance for its daily necessities for a period of years—a provision so important to the railway company itself and to the traveling public that it saw fit to secure and make it certain by stipulations giving it the right to veto any assignment of the lease or to declare a forfeiture of all the coal company's rights under the lease if it failed to observe its contract obligations. It appears that the coal company, while the contract was still in force and being executed, became embarrassed and unable to meet its pay rolls. As a result it might not be able to mine or deliver the coal which it had agreed to mine and deliver to the railway company, and which the latter imperatively required for its daily consumption. In this state of things the railway company agreed to waive its right to withhold payment for 15 days after coal was delivered to it and pay for some of it before it was delivered; and the coal company agreed, as found by the trial court, to repay such advances, not in money, but by furnishing coal in the months of July and August following at the price fixed by the original contract. This arrangement made when the coal company was in embarrassed circumstances, and obviously inspired by the necessity of meeting the pay rolls and for the ultimate purpose of securing performance of the only part of the original contract in which the railway company was interested, namely, securing its supply of coal, is so intimately and vitally related to the original contract that we are unable to agree

Digitized by Google

with the trial court that it was intended to be independent and separate from it. It was not, in our opinion, a modification of any of the substantive provisions of the contract, but was a change rendered necessary by subsequent events in the method of its execution only. It was an arrangement in no manner inconsistent with any of the provisions of the original contract, but only in aid of its execution.

The contract after the new arrangement remained as before. The coal company still had a right to mine coal on the same terms and conditions as before, and was bound to supply the daily needs of the railway company as before. The money paid in advance entitled the railway company to an amount of coal which the money so advanced would pay for according to the terms of the original contract. We think the inevitable meaning of the new arrangement, interpreted in the light of the conditions surrounding the parties and as necessarily intended by them, was to set apart a sufficient amount of coal after it should be mined as security for the payment of advances made. This result is not expressed in the conventional form of a mortgage or pledge, but the method of producing it was devised for the purpose of acquiring the needed money by the coal company and of furnishing security for its repayment. If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it and to treat it as creating an equitable charge or lien, however inartificially it may have been expressed. We cannot conceive it possible that the railway company, with all the machinery for self-protection and security afforded by the original contract, would, when the coal company became embarrassed financially, surrender that protection and security and voluntarily loan to the insolvent money to produce its coal without any security whatsoever. Accordingly we cannot agree with the learned trial court that the parties intended the advances to be independent transactions disconnected from the original lease and resulting only in simple contract debts or unsecured loans to the coal company. On the contrary, we think, as already stated, that the parties intended to appropriate and secure to the railway company sufficient coal when mined to repay the advances made by it.

In the case of Fourth Street Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855, the facts were that the Keystone Bank solicited and received from the Fourth Street Bank $25,000 of gold certificates, agreeing to give its check against its reserve in the Tradesmen's National Bank therefor. Instead of doing so, it gave in the execution of the transaction a check against its general account in the last-mentioned bank. The draft was duly presented for payment, and payment was refused. It was held in the case which was brought to subject moneys in the hands of the receiver of the Keystone Bank to an equitable charge or lien in favor of the Fourth Street Bank that, inasmuch as it was the intention and agreement of the parties that the check drawn generally should be paid out of a particular fund, such check, as between the parties, should be treated as an equitable assignment of that fund to the extent necessary to pay the check. In its opinion the Supreme Court made the following observations:

Digitized by Google

"When we look at the situation of the parties and the character of the transaction disclosed by the facts just referred to, no difficulty is experienced in ascertaining the intent of the parties. Both were banking institutions—banks of deposit. They were located in the same city. * * * It cannot be doubted that a mere request for the loan by the Keystone Bank from the Fourth Street Bank would have been so surprising that the contract would not possibly have been made without a statement of the reason which rendered the request necessary. * * * The deduction arises that, as it cannot be reasonably conceived that the loan would have been made without reference to an assignment of the particular fund from which alone the hope of immediate payment was to be reasonably expected, the parties must have and did intend to create a particular appropriation, charge, or lien on the property upon the faith of which they both dealt. * * * It is, of course, true that the method adopted to evidence the appropriation [by the Keystone Bank] was a check drawn generally upon the Tradesmen's Bank, but, as already stated, the authorities are clear that, when it is established that it was the intention and agreement of the parties to a transaction that a check drawn generally should be paid out of a particular fund, such check, as between the parties, will be treated as though an order for payment out of a specific, designated fund."

To the same effect are the following cases: Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075; Carr v. Hamilton, 129 U. S. 252, 9 Sup. Ct. 295, 32 L. Ed. 669; Duplan Silk Co. v. Spencer, 53 C. C. A. 321, 115 Fed. 689; Erie R. C. v. Dial, 72 C. C. A. 183, 140 Fed. 689; In re Cramond (D. C.) 145 Fed. 976; Reeves v. Kimball, 40 N. Y. 299.

The foregoing are sufficient to show how far the courts have gone in declaring transactions, not made strictly in the conventional language of a mortgage or pledge, to be equitable charges in the nature of such mortgage or pledge, when it is necessary to do so in order to execute the intent and purpose of the parties.

It follows that, if bankruptcy had not supervened, the railway company could have enforced its claim for advantages against the coal when mined by the coal company. Does the bankruptcy of the latter company deprive the former of the same remedy against the trustees? The administration and distribution of the property of bankrupts is a proceeding in equity (In re Rochford, 59 C. C. A. 388, 124 Fed. 182), and should be conducted on broad equitable lines, with a view of recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal or equitable, or both. In re Chase, 59 C. C. A. 629, 124 Fed. 753. The last cited case well expresses the broad and liberal spirit which pervades the bankruptcy act. It is there said by Circuit Judge Putnam, in delivering the unanimous opinion of the Circuit Court of Appeals of the First Circuit, as follows:

"It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. Williams' Law of Bankruptcy (7th Ed.) 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

Digitized by Google

See to the same effect the following cases: Hutchinson v. Le Roy, 51 C. C. A. 159, 113 Fed. 202, 205; Hutchinson v. Otis, 53 C. C. A. 419, 115 Fed. 937, 940; Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517.

The trustees stand in the shoes of the bankrupt. Whatever rights a third party had against the property of a bankrupt before adjudication, that party, in the absence of fraud or fixed liens created by state statutes in favor of others, has against his estate in bankruptcy. Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782.

In Thompson v. Fairbanks, the Supreme Court said:

> "Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

In the light of these authorities we have no hesitation in holding that the equitable charge created by the parties before the bankruptcy of the coal company should be enforced against the estate in the hands of its trustees.

Counsel for the trustees contend that no lien, equitable or otherwise, was created by the subsequent agreement, because it was not in writing and signed by the parties to be charged as required by section 3173, Gen. St. Kan. 1901, commonly known as the "statute of frauds." We find it unnecessary to consider the interesting question debated at the bar whether the oral agreement was such a substantive modification of the original one as distinguished from a change in detail of performance, as required it to be in writing to conform to the statute in question. It sufficiently appears that the railway company fully performed its part of the agreement. It advanced the money as agreed, but the coal company failed to repay it as agreed. Equity will not permit the statute of frauds to be invoked in favor of a party who has not performed his oral undertaking against one who, at his invitation and in reliance upon his promise, has expended money and changed his situation. That would make the statute an instrument of fraud rather than a means to prevent it. It cannot be so employed. Swain v. Seamens, 9 Wall. 254, 19 L. Ed. 554; Brown on Stat. of Frauds, §§ 457–460; Glass v. Hulbert, 102 Mass. 24, 36, 3 Am. Rep. 418; Suggett's Adm'r v. Carson's Adm'r, 26 Mo. 221; Winters v. Cherry, 78 Mo. 344, 349.

Another and conclusive answer to the trustees' contention in this case is found in their conduct on assuming the duties of their trust. They found an assignable executory contract in force between the bankrupt and the railway company—one that might be advantageous or disadvantageous to the estate. It was evidenced by writing, but the parties had changed its mode of performance as already

Digitized by Google

pointed out, so that as between them it consisted of the original instrument and the agreed modification.

It is well settled that trustees in bankruptcy are not found to accept property or take over contracts which are onerous and unprofitable, and which would burden, rather than benefit, the estate. In the execution of their trust they are confronted at the outset with the duty of electing whether to assume an existing executory contract, continue its performance, and ultimately dispose of it for the benefit of the estate or to renounce it and leave the injured party to such legal remedies for the breach, as the case affords. American File Co. v. Garrett, 110 U. S. 288, 295, 4 Sup. Ct. 90, 28 L. Ed. 149; Sparhawk v. Yerkes, 142 U. S. 1, 13, 12 Sup. Ct. 104, 35 L. Ed. 915; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; Dushane v. Beall, 161 U. S. 515, 16 Sup. Ct. 637, 40 L. Ed. 791; Watson v. Merrill, 69 C. C. A. 185, 136 Fed. 359, 363; In re Chambers, Calder & Co. (D. C.) 98 Fed. 865; Mercantile Trust Co. v. Farmers' Loan & Trust Co., 26 C. C. A. 383, 81 Fed. 254; Central Trust Co. v. Continental Trust Co., 30 C. C. A. 235, 86 Fed. 517.

If they elect to assume such a contract, they are required to take it cum onere, as the bankrupt enjoyed it, subject to all its provisions and conditions, "in the same plight and condition that the bankrupt held it." York Mfg. Co. v. Cassell, supra, and cases supra.

Any valid modifications of a written contract which may have been made by the bankrupt before adjudication, whether oral or in writing, and whether known or unknown to the trustees, are binding upon them if they elect to assume and perform the contract. They take it subject to all equities between the original parties. Reeves v. Kimball, supra; Wood v. Donovan, 132 Mass. 84; Homer v. Shaw, 177 Mass. 1, 58 N. E. 160; Mangles v. Dixon, 3 House of Lords Cases, 703. The duty rests upon the trustees to make inquiry and ascertain the true nature, character, and conditions of the contract before exercising their election. When the election is made to assume it where no fraud has been practiced upon them, they stand in exactly the same situation as the bankrupt himself stood prior to the adjudication. Cases, supra.

After presumably making all the inquiries necessary to fully acquaint themselves as to the advisability of taking over the executory contract in question the trustees in this case determined to do so, assumed the contract, and entered upon its execution. They mined coal, delivered it to the railway company, and, in the language of the trial court, "performed fully all the terms of the contract as it was written," but failed to conform to the condition created by the oral agreement to deliver coal to the railway company in payment of the advances made by it to keep the mine going.

From the foregoing the conclusion follows that the learned trial court should have sustained the interveners' petition and surrendered to them the leased premises or required the trustees, upon the assumption of the lease, to perform the condition of mining and furnishing the railway company sufficient coal to cover its advances. Not having done so and the lease having expired so that it cannot now be done, the assets of the estate, consisting in part of money

Digitized by Google

received for coal delivered to the railway company, should be subjected to the payment of such advances as a preferential claim.

The decree is accordingly reversed, and the cause remanded, with instructions to proceed according to this opinion.

HOOK, Circuit Judge, dissents.

(153 Fed. 511.)

CHICAGO & N. W. RY. CO. v. O'BRIEN.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1907.)

No. 2,446.

1. RAILROADS—INJURIES TO LICENSEE—SPEED—NEGLIGENCE.

In general, in the absence of a regulating statute or ordinance, a carrier may run its trains at such a rate of speed as it deems convenient for the conduct of its business, without being guilty of negligence per se in case a derailment occurs resulting in injuries to licensees on the train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 879. Rights of licensee on train, see note to Chamberlain v. Pierson, 31 C. C. A. 164.]

2. SAME—QUESTION FOR JURY.

Where defendant railroad company operated a fast mail train down a descending grade of 60 feet to the mile, and at the sharpest point of a 6 degree curve at the foot of the grade, at the rate of from 70 to 75 miles per hour, without slackening speed, and the train was derailed at the curve, resulting in the death of plaintiff's intestate, an express messenger working on the train, whether defendant was guilty of negligence was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 918.]

3. WRIT OF ERROR—EXCESSIVENESS OF DAMAGES—REVIEW.

The Circuit Court of Appeals has no jurisdiction to review an objection that the damages awarded in an action for wrongful death are excessive, though it is convinced that the trial court improperly exercised its discretion in refusing to grant defendant relief on such ground on the motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3873.]

In Error to the Circuit Court of the United States for the Northern District of Iowa.

Error to review a judgment obtained by Mary O'Brien, as administratrix of the estate of J. J. O'Brien, deceased, against the Chicago & Northwestern Railway Company.

D. E. Lyon (Lyon & Lyon, on the brief), for plaintiff in error.

R. M. Wright (Wright & Nugent and Healy & Healy, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This is the second appearance of this case in this court. When it was first here, a judgment in favor of the plaintiff was reversed because the trial court refused to instruct the jury that negligence could not be inferred from the fact of accident in

Digitized by Google

an action for the death of one who was not a passenger, but whose relation to the defendant was analogous to that of an employé and governed by the same principles. Also it was doubted that there was sufficient evidence that the derailment of the train which resulted in the death of the deceased was due to the negligence of the defendant. The general features of the case fully appear in the report of our previous opinion. Railway Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593.

At the second trial additional evidence of a dangerous rate of speed, in connection with the particular structure of the track at and in the vicinity of the place of wreck, was introduced, and the plaintiff again secured a verdict and judgment. The exceptions preserved at the trial and such of the assignments of error as were framed and set forth in the brief of counsel in the manner required by the rules of this court present but one question that requires our consideration: Did the trial court err in refusing the defendant's request for a directed verdict in its favor? In other words, was there sufficient evidence of the negligence of the defendant to require the submission of the case to the jury?

The train upon which the plaintiff's intestate was engaged as an express messenger and the wreck of which resulted in his death was a fast mail train running between Chicago and Omaha. Its schedule called for a speed of 45 miles per hour, though it does not follow that that speed was to be maintained over every portion of the track. The train was derailed a short distance west of Boone, Iowa, at the foot of a descending grade of 60 feet to the mile, and at the sharpest point of a 6 degree curve. There were but three curves as sharp on defendant's system in Iowa comprising more than 1,000 miles of railroad track, and it was the sharpest curve between Boone and the Missouri river. All other charges of negligence failing for lack of proof, the only claim left the plaintiff was that the accident was caused by a negligent rate of speed at which the train was being run by the engineer, considering the grade and the sharp curve at the bottom. Upon this question there was the following testimony for the plaintiff supplementing a description of the track and grade:

Lindell was a railway mail clerk upon the wrecked train. He had made the particular run about 60 times. For some minutes before the accident he was looking out of the side door of his car and observing the telegraph poles and other fixed objects along the right of way. After qualifying himself to testify upon the subject of speed, he said that the train was running from 70 to 75 miles per hour.

Sigafoos was an express messenger working in the express car under the directions of the deceased. He said that the train was going so fast over the curves near the point of derailment and the car was swaying so violently that nearly all of the piles of express packages were thrown down.

Dye showed his familiarity with railroad operations by testifying that he had been a railway telegrapher for about eight years. He saw the accident from a point about half a mile distant, and said that the engine was working steam in going down the hill, a thing which he had never observed before upon any of the 15 to 30 other occasions

Digitized by Google

when he saw the train at that place. The noise of escaping steam and the unusual speed attracted his attention.

Hoyt, a railway mail clerk of seven years' experience, had served upon this fast mail train for a year, and in going eastward and westward had passed over the track where the derailment occurred about every three days. On the occasion in question, and shortly before the accident, the letters were thrown from their pigeon holes at the side of the car by the violent lurching of the train. This was an unusual occurrence. He did not recall that it had ever happened before. The pigeon holes from which the letters were thrown were about seven inches in depth, with a downward slant of about an inch. He had difficulty in keeping his feet, and the clerks were tossed from side to side of the car. The train seemed to be going at a greater rate of speed than usual. He also said that he did not notice that the air brakes were applied, although if they had been the effect would have been noticeable.

Fox, a locomotive engineer with over 30 years' experience, said that a speed of 60 miles per hour down such a grade and upon such a curve would be unsafe, and the danger would be enhanced with the increase of the speed; also that the application of the brakes steadies a train when taking a curve at speed.

Dowd, a locomotive engineer, said that the purpose of applying brakes on a sharp curve is to steady the train. The testimony of Nettle and Johnson was to the same effect.

Bowles, an eyewitness who testified at the first trial, again said that the train was running with unusual speed, nearly twice as fast as on former occasions, and that, while previously this train slowed up at the descent, it did not do so at this time.

The rapid movement of trains in the carriage of freight and passengers and the mails, resulting from the insistent demands of the public and the necessities of commerce, has become a feature of our modern life, and the enterprise of the times finds expression in the train schedules of the carriers. A complete observance of these schedules, which would imply perfection in mechanism and human skill, is impossible in the practical operation of a railroad. Moreover, conditions constantly arise which as often require that some trains be rushed forward at increased speed as that others be held back in order that the business of transportation may not be unduly impeded and the engagements of the carrier may be measurably fulfilled. All of this signifies risk to life and limb of those who serve upon the train; but, if the company has been duly diligent in respect of operation, appliances, and ways, the risk is one that is assumed, and there is no recourse for a resulting injury. And so the general rule is that, in the absence of a regulating statute or ordinance, a railroad company is at liberty to run its trains at such speed as it deems convenient for the conduct of its business, and a high rate of speed is not, per se, negligence. But this rule has its limitations. For instance, there may be at particular points upon its railroad such defects in the track or such conditions of structure, though not defective, as to make the rate of speed at which a train is moving an element to be considered in determining the question of negligence. Railroad v. Bishard (C. C.

Digitized by Google

A.) 147 Fed. 496,[1] was a case of that character. A train moving at high speed was wrecked by being shunted to a siding constructed and designed for trains moving slowly or under control. See, also, Meloy v. Railway, 77 Iowa, 743, 42 N. W. 563, 4 L. R. A. 287, 14 Am. St. Rep. 325. There is an analogy in passenger cases, though the rules governing liability are different. Railway v. Lewis, 145 Ill. 67, 33 N. E. 960. In Railway Co. v. Clowes, 93 Va. 189, 24 S. E. 833, the court, after observing that as matter of law mere rate of speed, though unusual, is not negligence, said:

"Without doubt a rate of speed may be dangerous, taken in connection with other circumstances; as, for instance, the condition of the track, which would be entirely safe under other circumstances. The degree of curvature may be such as to render more than a given rate of speed dangerous, and a dangerous rate of speed is negligence."

The evidence in this case on behalf of the plaintiff, the substance of which has been given, is harmonious and of a substantial character, and in our opinion it is sufficient, being believed by the jury as against the countervailing evidence, to support the conclusion that the train was being negligently operated by the engineer in view of the unusual and excessive speed, the descending grade, and the sharp curve at the bottom. A statute of Iowa permits a recovery, although the deceased and the engineer were fellow servants.

Complaint is made of the amount of damages awarded. The attention of the trial court was directed to this matter by a motion for a new trial, which was overruled. We agree with counsel that the award is excessive, and that the defendant has been thereby deprived of its property to that extent; but it has been conclusively settled that the sole remedy for such a grievance is by appeal to the judgment and discretion of the trial court. Its refusal to act is final.

The judgment is affirmed.

(153 Fed. 514.)

FADLEY v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Third Circuit. April 30, 1907.)

No. 11.

1. WRIT OF ERROR—REVIEWABLE ORDER—JUDGMENT OF NONSUIT.

A judgment of compulsory nonsuit, entered by a federal court in Pennsylvania in conformity to the state practice, is a final judgment, and reviewable on writ of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 471.

Conformity of practice in common-law actions to that of state court, see note to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

2. CARRIERS—INJURY TO PASSENGER—GETTING OFF TRAIN—CONTRIBUTORY NEGLIGENCE.

Plaintiff's husband was struck and killed by a passing train at a station on defendant's railroad. In an action to recover damages for the death, the only testimony was that introduced by plaintiff, which was uncontradicted, and showed that the road was a double-track road, trains running west on the north track and east on the other, there being a space of 12 feet between the two; that there were platforms for passengers on

[1] 78 C. C. A. 62.

Digitized by Google

the north side of the north track and on the south side of the south track, but no platform between; that decedent alighted from a west-bound train on the south side of the same in the daytime, and started across the south track, when he was struck by an east-bound train thereon. The only witness to the accident was another passenger, an employé of defendant, who alighted on the same side in advance of decedent and crossed the south track ahead of the train. He testified that such train was in plain view and whistled, and also that he called and motioned to decedent to stay back, but that decedent started to run, and had reached the south rail when he was struck. There was no evidence of any invitation by defendant to passengers to alight on that side of trains, or that it had knowledge of any custom to do so; nor did decedent, who was a stranger to the place, have knowledge of any such custom, if it existed. *Held*, that the court properly directed a compulsory nonsuit on the ground of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1385-1397.]

8. WITNESSES—CROSS-EXAMINATION—SCOPE.

Where a witness of an accident by which a person was run over and killed by a railroad train, on his direct examination by the plaintiff in an action to recover damages for the death, testified generally to the situation and conditions surrounding the accident, and to certain acts of the decedent, the defendant was entitled on cross-examination to inquire in detail as to all the acts and conduct of decedent immediately preceding the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 931-948.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Charles Koonce, Jr., for plaintiff in error.

John S. Wendt, for defendant in error.

Before GRAY, Circuit Judge, and LANNING, District Judge.

GRAY, Circuit Judge. The writ of error in this case is to the judgment of the Circuit Court for the Western District of Pennsylvania, in a suit brought under the provisions of the statute of that state, by the plaintiff in error, as widow of Robert Fadley, deceased, and a citizen of said state, against the Baltimore & Ohio Railroad Company, a citizen of the state of Maryland. The plaintiff sues in behalf of herself and her children, to recover damages from the said defendant for negligently causing the death of the said Robert Fadley.

The statement of claim charges that, on the 13th day of August, 1905, the decedent was a passenger on one of the defendant's trains, hereinafter referred to as train No. 201, and that, just after alighting therefrom at a station known as Gratztown, in the state of Pennsylvania, and while crossing a parallel track of the defendant's road, owing to the negligence of the said defendant, he was killed by a train, hereinafter referred to as train No. 6, running thereon in an opposite direction.

At the said station at Gratztown, the defendant's road, which is a double track road, runs in an easterly and westerly direction. The northerly track is used by the west-bound trains and the southerly track by east-bound trains. Trains running on these tracks thus pass, as is usual, to the right of each other. On the morning of the accident,

Digitized by Google

the train No. 201, in which the decedent was a passenger, was proceeding westwardly, and therefore on the northern track. The decedent occupied a seat on the left hand side of the smoking car, next to the baggage car, which intervened between the smoking car and the locomotive. Two seats behind him sat Blackburn, a telegraph operator of the defendant company, who was called as a witness in the case. As the train was approaching Gratztown, decedent was notified of that fact by the conductor, as he held a ticket for that station. As the train slowed up at or near the station, Blackburn went out upon the forward platform of the smoking car and, standing upon the lower step upon the left hand side thereof and looking westwardly, stepped from the car while it was still in motion. At the same time, he heard the whistle of the approaching express train No. 6 on the southern track. He then started across the space between the two tracks in a somewhat diagonal direction, towards the platform on the southerly side of the east-bound track. He then became aware that the decedent was about to alight from the same side of the forward platform of the smoking car, and says he shouted to him to look out for No. 6, and that he threw up his hands as he did so. The decedent, however, alighted before the train had quite stopped, and Blackburn again shouted to him to stay back. He says:

"I hollered to him to stay back; it wasn't far from him and I knew I could only get across myself, and I knew if he did come across he wouldn't make it across, and I hollered for him to stay back, and I hollered again after I was on the platform; I hollered to him twice at least."

The witness explained that, as he first got off and before the train stopped, in order to go to the telegraph office at the westward end of the east-bound or southern platform, he went in a direction westwardly and diagonally across the intervening space and tracks; that as the train had moved further on before decedent alighted, and as decedent started diagonally in a southeasterly direction, their paths crossed each other, and on this account the witness, Blackburn, says he was close to the decedent when he shouted to him. Decedent, however, according to the witness, as soon as he alighted, started to run across the intervening space towards and across the east-bound track, and had almost cleared the southerly rail when he was struck by train No. 6, running at a high rate of speed, and instantly killed. Blackburn says that when he, Blackburn, started to go across, No. 6 was in full view, about the distance of two telegraph poles away.

Blackburn, the sole witness of the accident, was called by the plaintiff, and the facts which we have summarized were established by his testimony. Other undisputed facts are that, the distance between the west-bound and east-bound tracks was twelve feet; that there was a platform on the northerly side of the west-bound track, 150 feet long, and opposite to it on the south side of the east-bound track was another platform, both for the use of passengers. It was about the same length, but extended about 20 feet further west than the west-bound platform. These platforms were on the outside of both main tracks and were so placed that passengers on the west-bound trains would alight on the north side of the tracks, and those on the east-bound trains

Digitized by Google

would alight on the platform on the south side of the tracks. These platforms were about eight feet wide. From about the middle of the west-bound platform, there was a planked cross-way to the east-bound or southerly platform, which witness says was used for trucks, in wheeling baggage from one side to the other. It also appeared that the car in which decedent was a passenger was alongside of the northerly platform at the time the decedent alighted, and that this platform was in full view of any one upon the forward platform of the car; that no other passengers than the decedent and the witness, Blackburn, alighted on the south or left hand side of the train. Along the southerly platform, there was a freight house and an old box car, used as a telegraph office, and on the northerly side, on ground some eight feet above the platform and somewhat to the east, was a station house and ticket office. It also appears, from the testimony of Blackburn, that when decedent alighted, he alighted with his face partly turned toward the east and away from the oncoming train, and ran in a southeasterly direction and not towards the buildings on the south side of the platform. Three or four witnesses were introduced by the plaintiff, who testified that they had occasionally seen passengers on the west-bound trains alight from the south side of the train. There was no evidence, however, of invitation, express or implied, on the part of the road or its officers to passengers, that they should do so, nor was there any evidence of knowledge on the part of the road or its officers of such a custom, if custom it was, or that it so frequently happened that its officers and agents should have been aware thereof. It was also in evidence that the decedent was a stranger and not familiar with the situation at Gratztown or its surroundings. He, therefore, could not have any knowledge as to passengers more or less frequently alighting upon the south side.

There was no conflicting testimony as to any material fact, all the testimony being that of witnesses produced by the plaintiff. At the conclusion of this testimony, upon motion of the defendant, a compulsory non-suit was granted by the court, presumably upon the ground urged by the defendant, that the evidence adduced by plaintiff showed that the decedent was guilty of negligence which contributed to the accident resulting in his death. Afterwards, a motion was made by plaintiff to take off the compulsory non-suit, and the same, coming on for hearing, was argued by counsel and overruled by the court.

There are several assignments of error, the most important of which concern the action of the court in sustaining the motion of the defendant to grant a compulsory non-suit and in overruling plaintiff's motion to take off the same.

The question, whether a judgment of compulsory non-suit is such a final judgment as may be reviewed on a writ of error, has been settled in the affirmative by the Supreme Court of the United States, in Central Trans. Co. v. Pullman Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. The question was presented in a case from the United States Circuit Court for the Eastern District of Pennsylvania, and it was held that the Circuit Court should follow the state practice in ordering or refusing to order non-suits, and it was declared that:

Digitized by Google

"The judgment of non-suit being a final judgment, disposing of the particular case and rendered upon the ruling in matter of law duly excepted to by the plaintiff, is subject to be reviewed in this court by writ of error."

The same rule was followed in Coughran v. Bigelow, 164 U. S. 301, 17 Sup. Ct. 117, 41 L. Ed. 442.

A motion for compulsory non-suit always challenges the most careful examination and scrutiny by the court of the evidence adduced by the plaintiff, and the testimony and all inferences therefrom must be taken most strongly in favor of the plaintiff. With this caution in mind, we are of opinion that the court below did not err in granting the compulsory non-suit. The defendant company had provided the usual platforms on the north and south sides of the west-bound and east-bound tracks respectively. We must assume, for there is no evidence to the contrary, that they were properly constructed and adequate for the accommodation of passengers alighting from the trains stopping alongside of them. Their position was such on the outer and right hand side of the respective tracks, that passengers alighting upon them were in no danger from passing trains. They were on the sides upon which such platforms are customarily placed on double track roads, and obviously convenient and safe for passengers using them. Their position was an invitation, as well as a notice, to passengers to use them and alight on the right hand side of the train. There was nothing on the left hand side to indicate that passengers were to alight on that side, much less anything that could be construed as an implied invitation to so do. The decedent was a man of mature years, and there is nothing to show that he was not capable of intelligently observing his surroundings at the time in question. It was broad daylight when he alighted, and there was a clear view of the east-bound track for at least nearly half a mile in the direction from which No. 6 train was coming. Moreover, by the testimony in chief of plaintiff's own witness, the whistle of that train was sounded more than once before he started across the east-bound track. By the testimony of the same witness, he was warned of the approach of the train more than once, by the waving of the witness's hands and his shouting to look out for the train. Notwithstanding this, decedent started and ran diagonally across the intervening twelve-foot space and the east-bound tracks, upon the southern rail of which he was struck by the oncoming train. His course, as pointed out in the testimony, was such that it must have crossed that of the witness, Blackburn, and thus have brought the two so close together as to have made it improbable that the warning should not have been seen or heard. In the space of twelve feet between the two tracks, decedent could have safely and conveniently stood, while No. 6 passed by.

From these facts established by the undisputed testimony on the part of the plaintiff, no other inference seems reasonable than that decedent, with full knowledge of the approaching train, thought he had time, by running, to clear the east-bound track in front of train No. 6. With full knowledge of the situation, or opportunity thereof, of which he should have availed himself, he thus left a place of safety, where he had alighted, and attempted to pass in front of the swift-

Digitized by Google

ly moving east-bound train. In this, we see no ground upon which reasonable men could differ, as to the character of defendant's conduct. If this be so, the suggested negligence on the part of the company, in allowing a train at high speed to pass a station while another train is discharging its passengers, cannot affect the conclusion arrived at. No matter how negligent the defendant may have been, the negligence of the plaintiff was a contributing cause, without which the accident could not have happened.

The other assignments of error relate to the testimony elicited on cross-examination from plaintiff's witness, Blackburn. We have carefully considered those parts of the cross-examination duly objected to by plaintiff's counsel, and the exceptions taken to the action of the court in overruling the same. We do not find, however, that this testimony was permitted in contravention of the well-settled rules governing cross-examination. The witness, Blackburn, was called by the plaintiff at the opening of her case, and was the principal witness in her behalf. He testified to being a passenger on train No. 201; to the decedent sitting in front of him; what side of the car they sat upon; as to what the conductor said to decedent; as to how and when the witness alighted from the train; how and when and under what circumstances the decedent followed him and also alighted; as to how fast the train was moving; whether it had stopped when witness and decedent left it; as to the situation and dimensions of the platforms, the station buildings on either side of the road and the general physical environment of the place of the accident; as to the approach of train No. 6; as to its schedule time and as to its being late; also as to the schedule time of train No. 201 and as to its being late; as to what warning was given by No. 6 as it approached the station; and as to when he heard the whistle, whether before or after he alighted. It seems to us very clear that this testimony in chief opened up a very wide range for cross-examination. The further testimony of the witness was in continuation and elaboration of that already given. Having testified to part of the conduct of the decedent, in alighting from the train, defendant's counsel was properly allowed to explore the witness's knowledge as to all that decedent did immediately following his actions already testified to. Having testified to his having gotten out upon the wrong side of the train, and that another train was approaching upon the opposite track, of which warning was given by a whistle, it was certainly relevant to that testimony to inquire what was done by the decedent at that crisis. Everything, therefore, done by the decedent, after alighting from the train, seems to us to have been pertinent to the examination in chief.

The assignments of error in this regard are without merit, and for the reasons already given the judgment of the court below is affirmed.

Digitized by Google

(153 Fed. 520.)

UNITED STATES v. TOWN OF NAHANT. In re UNITED STATES. Ex parte TOWN OF NAHANT.

(Circuit Court of Appeals, First Circuit. February 1, 1907.)

No. 674.

1. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS BY UNITED STATES—JUST COMPENSATION.

Where the United States in its sovereign capacity exercises its arbitrary power to condemn private property for necessary public use, the just compensation which it is required by the Constitution to make to the owner should be determined on equitable principles, and should be such as to put the owner in as good condition pecuniarily as he would have been if the property had not been taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 325-402.

Nature and extent of power of United States to condemn property for public use, see note to Shipman v. Ohio Coal Exchange, 70 C. C. A. 653.]

2. SAME—PROPERTY OF MUNICIPAL CORPORATION—RIGHT TO COMPENSATION.

Where a town having statutory power to condemn land or right of way for sewer purposes actually acquired and took possession of land for such purpose, and constructed at large expense and had maintained for a number of years a sewer over the same without objection from the landowner, it has such an interest in the land and structure as entitles it to be justly compensated therefor when the same are taken by the United States for a paramount public use, without regard to the strict regularity of the proceedings by which it acquired the right. Such right of compensation also extends to structures placed by the town in public streets or roads, such as water or sewer pipes where such streets are taken, but not to the easements in the streets themselves, nor to material thinly spread upon the ground for road purposes of such character that it loses its identity and tangibility as property when so used.

3. SAME—RULE OF COMPENSATION.

In determining the just compensation to which a town was entitled on the taking of a part of its water and sewer systems by the United States, in proceedings to condemn land for government purposes, where the parts taken were essential to enable the systems to perform their functions, it was not error to permit the town to show the fair cost of restoring the water and sewer systems to their original efficiency of circulation, or to make such cost the measure of compensation.

4. SAME—INTEREST.

An award of compensation to a town under such circumstances should not include interest from the time of the institution of the proceedings where up to the time of the trial there has been no actual taking and the use by the town of its complete water and sewer systems has not been interfered with, but the award is based on the estimated cost in the future of completing the systems in view of their contemplated impairment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 397-399½.]

In Error to the District Court of the United States for the District of Massachusetts.

For former opinion, see 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723.

Asa P. French, U. S. Atty., and William H. Garland, Asst. U. S. Atty., for plaintiff in error.

Harrison M. Davis (James R. Dunbar, on the brief), for defendant in error.

Digitized by Google

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. We look upon a case like this, where the government in its sovereignty exercises its right to take private or municipal property for its necessary public purposes, as somewhat exceptional in respect to rules of damage or compensation. The right to take is a strictly arbitrary right, a right without any qualification, and one which at once cuts through all individual and inferior government conditions. The federal government arbitrarily, and as a supreme entity, takes, without question, for its own necessary defenses and other public uses, whatever it lays its hand upon. While this is so, and while it necessarily must be so, the other phase of the proceeding, and this is what makes the situation exceptional, contemplates "just compensation." "Just compensation" is the compensation vouchsafed to private interests by the federal Constitution. This phase of the case is not upon arbitrary lines. The government in a situation like this in effect says the right to take is necessarily arbitrary and must stand unchallenged; but having thus, under the strong arm of sovereignty, cut through private and municipal rights, the rigor of the arm shall be relaxed, and the government itself will see that just compensation is awarded accordingly. The paramount law intends that the owner shall be put in as good condition pecuniarily by a just compensation as he would have been if the property had not been taken. Lewis on Eminent Domain, § 464. In our view it is almost, if not quite, an element of the government's case to see to it that just compensation is ascertained and accorded. The question of just compensation contemplated by the Constitution is more an equitable question than a strictly legal or technical one. The policy of the government is to absorb all interests, so that it shall remain undisturbed in the exercise of its dominion over the property, and to this end its purpose is to render constitutional compensation under legal principles, softened somewhat by broad considerations of justice.

This proceeding in its inception comprehensively directed itself against lands and rights therein and against buildings. The act conferring authority upon the Secretary of War to institute condemnation proceedings did not necessarily limit the interests to be condemned to the phraseology of that particular act, but would probably be construed as conferring authority upon the Secretary of War to institute proceedings broad enough to invoke all existing condemnation power of the government in respect to property necessary for fortifications and coast defences, but, whether this is so or not, the act of August, 1890, directs itself against "any land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defences." Following out this idea, the petition for condemnation asked for an impartial appraisement of "lands and ways and interests therein, and any building standing on said land."

It is claimed by the government that the proceedings with reference to the town's waterworks and sewage system were not shown to be legal. Now, what was the town's status in this respect?

Sections 1 and 2 of chapter 50 of the Public Statutes of Massachu-

Digitized by Google

setts (1882), in force in 1894, authorized the selectmen of a town to lay out, make, and maintain, drains and sewers through the lands of any persons or corporations, subject to the provision that, when land was taken for that purpose, the proceedings in towns should be "the same as in the laying out of townways." The proceedings with reference to townways were provided for in sections 65 and sequence of chapter 49. There was an essential difference between proceedings for laying out sewers and laying out townways in this respect: While the selectmen might lay out sewers and take lands for that purpose, the proceedings with reference to townways were under the control of the town, and were required to be finally acted on at a town meeting properly called therefor. Section 71 of chapter 49 provided that a townway could not be established until its location was reported to the town, and accepted and allowed at a public meeting of its inhabitants; and it also directed that the "laying out" should be "filed in the office of the town clerk seven days at least before such meeting." Notwithstanding the general directions that proceedings in laying out sewers were to be the same as in the laying out of townways, the direction for filing the report of the latter proceeding in the office of the town clerk seven days before the meeting of the inhabitants was not appropriate to the laying out of sewers, because the statute as to the latter did not contemplate any such meeting. The record in this case, however, does not state whether a plan was filed with the town clerk. The record likewise fails to give the details of the proceedings in reference to the sewer in question. The substance of what is shown is that in March, 1894, the selectmen, in a warrant for a town meeting, brought before the inhabitants of Nahant the question of an appropriation for building sewers, that the plan of their proposed location was presented at that meeting, that there was an appropriation of $3,000 for such purpose, and that the sewers were constructed in accordance with that plan. This in a sense implies prior action by the selectmen according to the statute. It also appears from the record that the plan was never recorded in the registry of deeds; but the law providing for such a record was not passed until March 3, 1898. Acts 1898, p. 88, c. 134. Consequently this is irrelevant.

The answer of the town with reference to the statutory proceedings in laying out the sewers is not specific. It merely states that what was done in that respect was "in the exercise of its lawful rights and duties." Of course, that general allegation would include a legal taking under sections 1 and 2 of chapter 50 of Public Statutes (1882), to which we have referred, as well as any other lawful method of proceeding which might be suggested. In view of what appears in the record, and of the acquiescence in the proceedings of the town in regard to these sewers by everybody concerned until the United States undertook to dispute them, a period of more than eight years, and in view of the lack of any specific objections to the legality of the proceedings of the selectmen, except the statement that there was no record under the act of 1898, which, as we have shown, was not required, we think we may assume that the selectmen of the town of Nahant proceeded by condemnation to secure rights for the sewers in question in accordance with the Public Statutes of 1882.

Digitized by Google

Apparently the only failure on the part of the selectmen was in not proceeding for an assessment of damages in accordance with section 3 of chapter 50; but this was not necessary as against the owners in 1894 of the lands here involved, and their successors in title. This was settled in Roberts v. Northern Pacific Railroad Company, 158 U. S. 1, 10, 11, 15 Sup. Ct. 756, 39 L. Ed. 873; and there are other decisions in that line which recognize the idea that, after an acquiescence on the part of landowners such as we have here, no proceedings can be taken by them except to obtain an assessment of damages. Indeed, the decisions seem to go further, and not to leave it open to the United States to dispute the right of the town to its sewers, even if the proceedings of the selectmen in laying them out were informal. According to Roberts v. Northern Pacific Railroad Company (at page 10 of 158 U. S., 15 Sup. Ct. 756, 39 L. Ed. 873), it was probably sufficient if the town, or its authorized officers, under a power of eminent domain, entered into actual possession of lands necessary for its corporate purposes, either with or without the consent of the owners. As the selectmen had authority under the statutes to take the lands in question for sewers, and in fact did take possession in accordance with a plan which sufficiently shows what was taken, and as the owners acquiesced in what was done, the rights of the town were complete as against the owners and their successors in title so far as involved in the proceeding before us.

Moreover, and upon a broader ground, under the conditions existing here, we do not think it necessarily follows that an interest in land must have ripened into a strictly common-law easement in order to entitle a party to just compensation. We think the Constitution contemplates just compensation for such interest as a party has and such as is taken. Of course, it must be an interest or a right recognized as of some value under legal or equitable principles.

In this case the town, in its municipal capacity, at least entered upon land under a parol license from an individual owner for which it paid $100, and upon land under a parol license from the treasurer of the land company, and constructed public sewer works at large expense, a situation in which the land company and the individual owner acquiesced for years. The town likewise in its municipal capacity constructed public waterworks in which the pipes were laid in its streets or highways.

Under such circumstances, and without regard to the question of the authority of the treasurer of the land company or to the strict regularity of the municipal proceedings in respect to its works, we think the right of the town in the nature of an easement amounted to an interest for which it is entitled to be justly compensated under the fair meaning of the Constitution. And this we think is so both as to lands condemned and as to such as were secured by purchase which the government holds subject to the interests of the municipality. See Randolph on Eminent Domain, §§ 387, 390; Roberts v. Northern Pacific Railroad, 158 U. S. 10, 11, 15 Sup. Ct. 756, 39 L. Ed. 873; Northern Pacific Railroad v. Smith, 171 U. S. 260, 270, 18 Sup. Ct. 794, 43 L. Ed. 157; Walton v. Green Bay, etc., R. Co., 70 Wis. 414, 418, 36 N. W. 10; McAulay v. Western Vt. R. R. Co., 33 Vt. 311,

Digitized by Google

78 Am. Dec. 627; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 215, 8 N. E. 460, 59 Am. Rep. 341; Davis v. Titusville & O. C. R. Co., 114 Pa. 308, 314, 6 Atl. 736; Brimmer v. Boston, 102 Mass. 19.

As to the road material, we think its nature is such that it cannot become the basis for recovery, either as land, structure, or personal property. This is understood to be a thin layer of macadam road material. If the material consisted of paving stones, or wood blocks of structural formation, which in the ordinary course of road repairing or road building might be taken up and placed elsewhere for beneficial purposes, it quite likely might be otherwise. But when material of the character in question is thinly spread upon the ground for highway purposes it loses its identity and tangibility as property, and in view of the purpose for which it is used would be accepted as something permanently dedicated to that particular public use. We find no authority, nor do we see any reason, for treating road material of the character in question either as a structure or as an interest in land for which recovery or compensation can be had.

Now as to the rule which the trial court adopted for the purpose of submitting the question of just compensation to the jury.

Some phases of the questions arising upon this writ of error were necessarily discussed by this court in its opinion when the case was first before us. Town of Nahant v. United States, 136 Fed. Rep. 283, 70 C. C. A. 641, 69 L. R. A. 723. The primary question, of course, is just compensation, and this means the full equivalent for the property taken. Monongahela Nav. Co. v. United States, 148 U. S. 312, 326, 13 Sup. Ct. 622, 37 L. Ed. 463. The difficulties of getting at just compensation are not so great where an entire property is taken as where a part only is taken. Where a part only is taken, resort must be had oftentimes not only to the value of what is taken, but to the situation in which the part not taken is left. Under such circumstances the books apparently recognize several expedients as reasonable, by way of evidence, for getting at what will make the owner whole. The reasonableness of the application of a particular rule of evidence quite likely depends on the particular circumstances in a given case. In the case at bar the property taken was part of a system of public municipal works which must be restored and maintained in the interests of local health and public good. The expedient adopted by the trial court was one which seems to have been recognized in United States v. Gettysburg Electric Railway Co., 160 U. S. 668, 685, 16 Sup. Ct. 427, 40 L. Ed. 576, where it is said in effect that, if the part taken is essential to enable the railroad corporation to perform its functions, or if the value of the amount remaining is impaired, such facts might enter into the question of the amount of compensation awarded. See, also, Town of Nahant v. United States, 136 Fed. 273, 284, 70 C. C. A. 641, 69 L. R. A. 723. In this case the part of the system taken was essential to enable it to perform its functions, and the rule of evidence adopted for the purpose of ascertaining just compensation permitted the town to show the fair cost of restoring the water and sewerage system to the original efficiency of circulation. We think this was a reasonable and just expedient under the circumstances. Where part is taken just compensation includes damages to the re-

Digitized by Google

mainder (Lewis on Eminent Domain, § 464, and authorities, note 86), and the evidence under the rule adopted was one way of showing the damages which the town sustained by reason of what was taken.

Now as to interest. Without regard to the question whether the time of taking relates to the date of the inception of the condemnation proceeding, or to the date of the decree, the time is often fixed by a rule of fiction having reference to a constructive rather than to an actual taking, and we do not think the question of interest is necessarily controlled by a fictional rule. In this case it is admitted that at the time of the trial there had been no actual interruption of the town's possession, and that the town had continued in its enjoyment of the right as fully as it would have done if the government proceedings had not been instituted. The just compensation has not therefore been withheld, and its ascertainment in fact in this particular case is made to turn on what it would cost to construct other works, and it is not suggested that any expenditure in fact has been made in that direction.

The equitable rule sustained by authorities (Lewis on Eminent Domain, § 499, note 44), which under certain circumstances permits an adjustment between the value of the use of the property and interest, is said to be one derived from the constitutional provision requiring just compensation. Looking at the enjoyment of use here as based upon fact rather than fiction, if the town were allowed interest from the date of the filing of the petition, it would be allowed more than just compensation, because it would have enjoyed both the benefit of possession and of interest. As the rule of evidence adopted for ascertaining just compensation permitted the town to show the estimated cost of necessary future expenditures, it would be giving the town more than just compensation to add interest to the estimated future expenditures.

In this case there were special verdicts based upon the different claims of the town, all of which included interest, and the amount of interest appears upon the face of each special verdict. There was also a general verdict which included all the special verdicts.

This case is remanded to the District Court, with directions to open the decree entered on July 27, 1906, so far as it relates to compensation to the town of Nahant, and to enter a decree for the amounts awarded by the jury on account of the water supply system $3,850, and on account of the sewer system $9,300, making a total of $13,150, without interest, and for the costs in the District Court, and for nothing more.

(153 Fed. 525.)

MANSON et al. v. WILLIAMS.

(Circuit Court of Appeals, First Circuit. May 16, 1907.)

No. 688.

1. BANKRUPTCY—ORDER OF ADJUDICATION—CONCLUSIVENESS OF FINDINGS.

Where a petition in involuntary bankruptcy alleged that the two defendants owned a stock of goods as partners, and that therefore a partnership existed which it was prayed might be adjudged a bankrupt, and such adjudication was made, it was a conclusive determination of the owner-

Digitized by Google

ship of the stock of goods as between the parties to the proceeding, but could not bind the trustees in bankruptcy of one of the alleged partners, who had taken possession of and sold the goods as assets of his individual estate, and who were not permitted to become parties to the partnership proceeding.

2. SAME—PARTNERSHIP—EVIDENCE TO ESTABLISH.

The owner of the stock of goods in a store turned the same over to his brother, who personally conducted the business thereafter under a company name, which was publicly used in all transactions relative to the business. It was originally the intention to form a corporation to own the business, the most of the stock to be issued in the first instance to the brother who owned the goods, but such intention was never carried out. *Held*, that there was a partnership in fact between the brothers in the business, which might be adjudged a bankrupt, and which was the owner of the property and assets of the business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 51; vol. 38, Partnership, §§ 1–38.]

Appeal from the District Court of the United States for the District of Maine.

For opinion below, see 148 Fed. 205.

John W. Manson (Harry R. Coolidge, on the brief), for appellants.

John S. Williams (Albert S. Woodman, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. The controversy in this case arose as follows: On the 14th day of July, 1904, Henry Hudson filed a voluntary petition in bankruptcy, on which he was adjudicated a bankrupt, and John W. Manson, Albert W. Chapin, and Freeman D. Dearth were duly appointed and qualified as trustees of his estate on the 23d day of August. Subsequently, on October 22d of the same year, a petition was filed by creditors against Henry Hudson and James Hudson, alleging that they were copartners doing business under the style of the Hudson Clothing Company, and praying that they be adjudged bankrupts as such copartners. Henry Hudson and James Hudson were brothers. On the 9th day of the succeeding November a denial of bankruptcy was filed by the trustees of the estate of Henry Hudson. On November 21st Henry and James each filed their answers denying the allegations of the petition. On November 22d a further answer of the trustees was filed. On the 24th day of the succeeding January an order was made as follows, "Case to stand for hearing on question of adjudication on petition and answers of James and Henry Hudson"; and a hearing was had on June 13, 1905, by the District Court, as the result of which James and Henry were adjudged bankrupts, as copartners under the style of the Hudson Clothing Company. Subsequently a petition for a rehearing was filed and denied.

No doubt on the creditors' petition the real controversy considered and passed on was whether there was any such copartnership as the petition alleged. There was nothing, however, to qualify the order of January 24th that the case was to stand for hearing on the creditors' petition and the answers of James Hudson and Henry Hudson; and it is thus apparent from the record in the District Court that the

Digitized by Google

trustees of the estate of Henry Hudson were not regarded as being in court with reference thereto.

At the time Henry Hudson filed his petition in bankruptcy, a stock of general merchandise, such as is customary in country stores, was in the control of himself or his brother James, or of both of them. This stock was taken possession of by the trustees in bankruptcy of Henry Hudson, and sold by them, and the present controversy arises out of a claim of John S. Williams, who was appointed trustee of the alleged bankrupt copartnership, to the proceeds of the sale on the ground that the merchandise belonged to the Hudson Clothing Company. The case was heard by the learned judge of the District Court, where the bankruptcy proceedings were pending, and decided by him in favor of Williams as trustee, whereupon the trustees of the estate of Henry Hudson appealed to us.

One feature of this case which we cannot pass by is that the questions of the existence of a copartnership and of the title to the stock of goods are identical; that is to say, if the stock of goods was the individual property of Henry Hudson, there was no copartnership, and, if there was no copartnership, the stock was his individual property. Therefore the substance of a like issue to that before us was adjudicated on the creditors' petition to have Henry Hudson and James Hudson adjudged bankrupts as copartners. The question at once arises whether the issue is not already concluded. It might have been if the trustees of Henry Hudson's individual estate had been allowed to intervene and become parties to the hearings on the creditors' petition. Of course, so far as ordinary bankruptcy proceedings are concerned, the adjudication of the District Court on that petition determined the status of the Hudson Clothing Company; but, as the trustees who have appealed to us had not been included as parties thereto, as we have explained, the fact of the status of the Hudson Clothing Company for ordinary purposes cannot affect the alleged rights of the appellants, or bar these proceedings.

We agree with the conclusion of the learned judge of the District Court, and approve his observations so far as he has expressed himself, with reference to the issues before us. 148 Fed. 305. Probably, with regard to the adjudication on the creditors' petition, he had orally explained himself fully, so that on the issue now before us he did not deem it necessary to express himself except in a general way; and, as the questions involved are to a certain extent novel, we conclude that our opinion in reference thereto had better explain itself.

We will observe, however, that the learned judge of the District Court found that there was a copartnership in fact between the two brothers under the style of the Hudson Clothing Company. He did not rest his conclusion in any way on any hypothesis of a copartnership by estoppel in the strict sense of the expression. This is important, because we regard the law as settled that, in bankruptcy proceedings involving a copartnership, the copartnership is, ordinarily, to be regarded as a true entity, precisely as the individual partners are. Various incidental reasons are given for this, the principal one of which is that otherwise there would be two classes of creditors whose equities otherwise are equal, one of which classes would share

Digitized by Google

in the proceeds of certain property on the ground that two or more persons were estopped as to them from denying a copartnership, while other creditors who had contributed to the same enterprise would be left to what might remain of the property involved in the enterprise after the first class were paid, or to one or more individual estates. The fundamental reason, however, is that all through the various statutes of bankruptcy, whether in the United States or in England, which deal with copartnerships, the individuality and the entity of the copartnership are recognized to the same extent as the individuality and the entity of the several persons involved therein. The entire rule on this topic, so far as we have occasion to refer to it, is well deduced from Ex parte Sheen, 6 Ch. D. (1877), 235, to which case we will return again.

In view of these suggestions, however, we will say that there is in the record a large amount of correspondence, some of which may tend to show a copartnership by estoppel in favor of numerous creditors, and some of which might raise an indication that there was in fact no partnership. All of it, however, can be passed by as having no clear tendency in any direction so far as the issue before us is concerned, without any further comment in reference thereto. We regard the case as easily disposed of on the theory of a real copartnership on the facts stated by Mr. Henry Hudson, as follows:

"For some time prior to April, 1902, I have been equitable mortgagee, or in fact owning the stock of goods in the store conducted by J. A. Rand, in Guilford Village, Me. Mr. George F. Newbegin, who then lived in Guilford, had an equitable interest in the goods. In the latter part of April, 1902, I deemed it for my interest to take said goods. I communicated with Mr. George F. Newbegin, and Mr. Newbegin and J. A. Rand took the account of stock as a basis of settlement between Rand and Newbegin. After this account of stock was taken, Mr. Newbegin turned over to me the stock of goods as my own. I had these goods and desired to sell the goods. Immediately after this transaction was closed with Mr. Newbegin, I had two telegrams to go to Bangor, where my brother, James Hudson, was conducting a grocery business. After I got to Bangor, I deemed it for his interest that he should close out his grocery business at Bangor, and for him I did close out the business. I told him that I had a stock of goods at Guilford, and that he could go to Guilford and go into business there in the same store where the business had been carried on by J. A. Rand, and with this stock of goods he came to Guilford and went into the store. He had the original account of stock which had been taken of the goods and examined it. I said to him that I would form a corporation; that it would take three of us; that myself and he, with a third party, would make up the corporation, and he could have all of the goods; and that it should be his business, but the stock, when issued, I should hold, and, as he could pay me, he was to pay me for the stock of the corporation, and it was to be turned over to me after the corporation was formed. I would transfer to the corporation the goods, so that the corporation could hold the goods. It was talked between him and myself that my aunt, Martha Martin, should be the third party to make up the corporation; that he could hold some of the stock, and Mrs. Martin should have enough so as to make her eligible as a party to the corporation. I think it was about the 6th of June that he went into the store to do business. Some time in the month of June I did draw up an agreement under the statute to form a corporation, and also wrote a certificate as required by law. Nothing further was done with these two documents by me. They remained in my office. I never showed them to my brother, James Hudson, or to Mrs. Martha Martin. I did not complete the organization at that time on account of the condition of my brother. I thought from week to week that circumstances might change, and then I would complete the organization. So that

Digitized by Google

this was allowed to go from time to time until August, 1903, when my brother was away from the store for about six weeks, and returned the latter part of September or first of October, and after that pressing business matters of my own caused me to neglect to do anything further in regard to completing the organization of the corporation. My brother never saw the documents that I had drawn up. I never transferred to any one the title of these goods which I had from Mr. Newbegin. My brother was in the store and conducted the business entirely. He did not consult with me at all in regard to the management of the business. Whatever goods I took from the store I purchased and bought, principally at prices at the time which he gave me, and practically paid for everything that I took from the store, and so far as I can recollect I never had any goods charged that I took from the store. I made purchases there the same as I purchased goods at other stores. I never had anything from the store but what was paid for.

"There never was any talk between us about forming a partnership or that I should ever receive any profit from the business. I was to hold the stock of the corporation, when formed, only as security, and to be turned over to him as his property as he paid for it. I did what I did for the express purpose of having him go into business at Guilford to carry the business on as practically for himself. The idea of a corporation was that he could hold it and manage it best as his own, and I still be in a measure protected by holding the stock. I cannot state the time when I first knew of the name of the Hudson Clothing Company. It must have been some time in the summer. I was not consulted in so far as the name was concerned. My first knowledge in regard to the name was obtained, not from my brother, but, I think, from seeing the advertisement which he put into the newspaper or on the boards he put out upon the highway or upon the corner of the store. We never had any talk whatever in regard to the use of the name, or in regard to the conducting on of the business. I advanced or let him have money from time to time to pay, as he said, bills that he had contracted. I also paid notes that he had given; these notes having been brought to me and indorsed by me for him. The amount which I paid on account of debts which he had contracted after he went into the store aggregate about $5,000. These sums of money which I let him have I charged upon my books under the name of Hudson Clothing Company, except in some few instances. These instances I am not now able to state the dates or exact amounts. Not having seen my books for some time to make examination, I used the name of the Hudson Clothing Company simply as an identification to keep the account by itself. I did indorse for him, from time to time, notes given to persons, firms, or corporations from whom he had purchased goods."

Affairs continued in the manner thus described until Henry Hudson filed his petition in bankruptcy; that is, until July, 1904, being more than two years, except that the name Hudson Clothing Company was publicly exhibited by a sign on the store where the business was transacted; that the bills received and rendered carried that title; and that, beginning with September, 1902, the account with the First National Bank of Guilford, at which the deposits of the business were made, which until that time had been kept in the name of James Hudson, was changed to Hudson Clothing Company, and checks were subsequently drawn as the checks of the Hudson Clothing Company. There was thus a general holding out to the public to that extent. Although for the purpose of maintaining merely an estoppel in the strict sense of the word, this cannot be availed of, as we have shown, it is available on the question of the existence of a copartnership in fact, because, as this all occurred in the small town in which Henry Hudson lived, and as he admitted that he knew the name Hudson Clothing Company had been used, the learned judge of the District Court had a right to find as a fact that he knew, or ought to have known, the extent to which that had gone. Bearing in mind the

Digitized by Google

fact that all agreements as to which no particular form is demanded may either be proven as made expressly or proven as made by implication, the fact of this public use of the name, apparently that of a copartnership, must be given its due effect.

At this point we return to Ex parte Sheen, 6 Ch. D. (1877) 235. It is true that it was held by the Court of Appeals that the mere fact that one who has held himself out to a small number of creditors as a copartner with a trader is not barred from proving against the trader, whatever may be his liabilities to the few persons with reference to whom he may be estopped; but Lord Justice James, in his opinion, at page 237, observes that there was no actual copartnership in the case, and "no ostensible partnership, no holding out to the world, that is, to creditors generally, that there was a partnership, * * * so as to make a joint estate." This fairly implies that a holding out such as we have here may, at least to some extent, support a finding that there was a copartnership by implied agreement, or that the parties had drifted into the relationship of copartners in fact. This subject is treated sufficiently in Williams on Bankruptcy Practice (8th Ed.) 166, 167, where there is a discussion of reputed ownership, which, of course, does not exist in the United States to any definite extent, and also of an ostensible copartnership of the kind referred to by Lord Justice James, with some examination of the authorities on both these topics, which it is not necessary for us to follow out.

It is plain that the original arrangement between the two brothers did not contemplate a copartnership, but simply an intrusting by Henry to James of property belonging to Henry, to enable James to work it up for his own benefit. True it is that, in regard to the proposed corporation, the trustees of the estate of Henry Hudson cite Fay v. Noble, 7 Cush. (Mass.) 188, Bank v. Almy, 117 Mass. 476, and Ward v. Brigham, 127 Mass. 24, to the point that parties who join in the contemplated organization of a corporation do not thereby become copartners. Two of these cases relate to the general proposition that members of a de facto corporation which is defectively organized are not copartners, and the other to peculiar circumstances with regard to the relations among themselves of partners contemplating a corporation; the peculiar circumstances establishing no general principle. None are at all in point here. The intention to form a corporation slumbered so thoroughly, and so long, that it is of no effect.

Probably the best definition of partnership is that found in the partnership act of 1890 (St. 53 & 54 Vict. c. 39), which reads as follows: "Partnership is the relation which subsists between persons carrying on a business in common, with a view of profit." It is necessary to note the significance of the words "carrying on a business," which implies a relation entirely different from the enforced relation of tenants in common, as the owners of a ship or of a house, who must either let the property lie idle or keep it in some way occupied or used, deriving a return from such occupation or use. Various illustrations of the force of this distinction will be found in Pollock's notes to the act referred to, entitled "A Digest

Digitized by Google

of the Law of Partnership," (5th Ed.) 2, 3. Mr. Justice Gray, in Meehan v. Valentine, 145 U. S. 611, 618, 12 Sup. Ct. 972, 36 L. Ed. 835, gives a definition almost precisely like that which we have cited from the partnership act, as follows:

"The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits."

The difficulty with definitions, like some of those brought forward by the trustees of the Henry Hudson estate, is that they put the agreement to share profits to the forefront. The right to share profits is, of course, an element in a true copartnership; but, when it is said that a copartnership involves an agreement to share profits, it goes beyond the legislative definition, and that of Mr. Justice Gray which we have quoted, and unnecessarily beyond them. The right to share profits, of course, exists; but the right may arise without anything in the nature of an express agreement, indeed, without anything in the nature of an implied one. The right to share profits is an indication of the existence of a copartnership, but it may result from an agreement to that effect, or it may flow out of the relationship which exists between the parties. It is true that the present case is embarrassed by the fact that, in the absence of any agreement as to the profits, in connection with the further fact that Henry Hudson contributed only assets, while James Hudson contributed only personal services, it may be difficult to determine how profits would have been shared, and therefore it is plausible to suggest that there could have been no profits, and consequently no partnership. Nevertheless, both of these details are met by Paul v. Cullum, 132 U. S. 539, 550, 10 Sup. Ct. 151, 33 L. Ed. 430, where it was observed that, in the absence of any evidence showing a different intention, partners would be held to share equally both profits and losses.

The result is that, whatever may have been the intention when Henry Hudson put the property into the hands of James Hudson to be managed by him, those gentlemen and the circumstances of the business drifted entirely away from it, and the relations between them must be determined by what afterwards ensued. Those relations embraced all the elements necessarily included in the definitions given by the partnership act and by Mr. Justice Gray; and it is impossible to characterize the substantial result except as has been done by the learned judge of the District Court.

The question of interest passed on by the learned judge of the District Court was fully explained by us in Hutchinson v. Otis, 115 Fed. 937, 53 C. C. A. 419, in an opinion passed down on May 22, 1902, which is the same case reported as Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179. His decision in regard thereto conformed to the rule stated by us, and was undoubtedly correct.

The decree of the District Court is affirmed, and the appellee recovers his costs of appeal against the appellants as trustees.

Digitized by Google

(152 Fed. 98.)

FERGUSON v. BLOOD.

(Circuit Court of Appeals, Ninth Circuit. March 11, 1907.)

1. VENDOR AND PURCHASER—CONTRACTS—EXECUTION—EVIDENCE.

Defendant, having agreed to purchase an interest in certain mining claims, at a meeting of all the parties stated to plaintiff that he would sign the contract on its receipt from his agent, L. Defendant proceeded under the contract as though it had been signed by all the parties, made payments under it, went into possession of the property, participated in its development as though the contract had been executed, and on the trial refused to produce the original on notice. *Held* to warrant an inference, in the absence of evidence to the contrary, that defendant in fact signed the contract.

2. FRAUDS, STATUTE OF—RIGHT TO URGE—ESTOPPEL.

Where defendant led plaintiff to believe that he had signed a written contract for an interest in certain mining claims, and induced plaintiff to purchase claims on which he had options, and to otherwise expend money and time to carry out the provisions of the agreement, defendant could not assert that the contract was void under the Idaho statute of frauds because he did not in fact sign the same, under Rev. St. Idaho 1887, § 3225, declaring that, where a contract which is required by law to be in writing is prevented from being put in writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts on such belief to his prejudice, may enforce it against the fraudulent party.

3. SAME—PART PERFORMANCE.

Where a contract for the purchase of an interest in certain mining claims was wholly performed by the vendor, and almost completely performed by the purchaser, prior to the latter's repudiation thereof, such performance was effective to take it out of the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 293, 294.]

4. VENDOR AND PURCHASER—VENDOR'S LIEN—FORECLOSURE—DEFICIENCY JUDGMENT.

Where a seller of an interest in certain mining claims retained title to the buyer's interest to secure payment of the price, the vendor was entitled to foreclose the lien so retained on the purchaser's default, as provided by Rev. St. Idaho 1887, §§ 3440, 4520, and 4521, and to recover a a deficiency judgment against the purchaser on the failure of his interest to sell for enough to satisfy the debt.[1]

Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

Hawley, Puckett & Hawley, for appellant.

Richards & Haga, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellee was plaintiff in the court below, the suit being brought by him against the appellant and one S. C. Fulton, based upon an alleged written contract entered into between the appellant, Ferguson, as party of the first part, and Blood and Fulton, as parties of the second part, concerning certain placer ground in Boise county, Idaho. The plaintiff below in his complaint set out a descrip-

[1] See note at end of case.

Digitized by Google

tion of the property alleged to be included and intended to be included in the contract, and charged that one-half of the amount to be paid by the appellant, Ferguson, under its terms, was to belong to Blood, and the other one-half thereof to Fulton; that pursuant to the terms of the contract the appellant, Ferguson, paid to Blood and Fulton $19,500 each, but defaulted in the payment of the last $11,000 due, and refused to pay the same, or any part thereof, after demand made for such payment; that Blood and Fulton "fully kept and performed all and every of the terms of said agreement by them and each of them to be kept and performed"; that Fulton refused to join as plaintiff in the suit, for which reason he was made a defendant thereto; and that there remains due and owing the plaintiff, Blood, from Ferguson, under the terms of the contract, the sum of $5,500, with interest thereon from the 15th day of August, 1902—the plaintiff's prayer being for judgment against Ferguson for that sum, with interest, and that a decree be made for the sale of all of his interest in and to the described premises, the proceeds of which sale to be applied in the payment of the amount due the plaintiff and the costs and expenses of the suit, and that the defendant, Ferguson, and all persons claiming under him, be barred and foreclosed of all rights and equities in the premises, and for general relief.

The alleged written contract was annexed to the complaint and made a part thereof. It bears date July 26, 1901, and purports to have been made by and between Ferguson as party of the first part, and Blood and Fulton as parties of the second part, by which the parties of the second part agreed to convey and deliver to the party of the first part an undivided one-half interest in certain described mining ground situated in Boise county, Idaho, "to all of which properties the said parties of the second part hereby agree to secure undisputed titles before any consideration shall be given by the party of the first part," and by which the parties of the second part further agree to convey to the party of the first part an undivided one-half interest in all the personal property on the premises described, consisting of cabins, ditches, water rights, flumes, piping, Hotchkiss giants, and other tools and implements used in working the property; in consideration of which grant and the other considerations mentioned in the contract, the party of the first part agrees to pay the parties of the second part the sum of $50,000, in manner following, to wit:

"Seventeen thousand dollars ($17,000) at or before the signing of this agreement; ten thousand dollars ($10,000) in three months from the date hereof; seven thousand dollars ($7,000) in five months from the date hereof, or at a later date (it being hereby stipulated and agreed by the parties of the second part that they will earnestly endeavor to secure an extension of payment on the options now held by them and which the aforesaid seven thousand dollars is intended to liquidate, which will permit deferring this latter payment of seven thousand dollars to a date three months later than above stated). Three thousand dollars ($3,000) in eight months from the date hereof, and the remainder or thirteen thousand dollars ($13,000) on the 15th day of August, A. D. 1902; and should the party of the first part default or be unable to make these latter two payments at the time specified it is agreed by the parties of the second part that he shall have further time to make such payments, and shall not forfeit any right or interest he may have acquired in the said property by reason thereof."

Digitized by Google

The alleged written contract further provides that out of the first payment of $17,000 the parties of the second part would erect, build and equip a first-class dredging plant of the Morris pattern, or some similar pattern, to be mutually agreed upon by the parties to the agreement, and place the same upon a boat 30 feet wide and 75 feet long on the mining ground described, together with a force pump having a nozzle pressure of 100 pounds to the square inch, one tubular boiler of 75 horse power, and one engine of 70 horse power, with all necessary connections, including shafting, pulleys, belts, derricks, head box, double sluice boxes, and riffling, and all other auxiliaries, tools, etc., requisite in a first class dredging plant of the kind, the pump to be equipped with a suction pipe not smaller than 10 inches in diameter.

The alleged written contract contains these further stipulations:

"It is further agreed by the parties of the second part that if a certain tract of land of about five hundred acres of land lying west of the Lippincott property, as described above, shall be available, they will locate the same and add it to the lands above described which are to be the joint property of the parties hereto under this agreement, and that the expense of locating, recording and doing assessment work on the said lands shall be borne by the parties hereto jointly.

"It is also agreed that if a certain placer property comprising fifteen hundred acres more or less, located on Kanley Creek adjacent to the properties above described and owned and controlled by the Gold Sand Mining and Milling Company, of which Messrs. Blood and Fulton, parties of the second part, are parties in interest, shall become available and can be purchased, the parties of the second part agree to acquire the same and consolidate it with the property first described herein on conditions hereafter to be agreed upon by the parties hereto, provided a mutual and satisfactory agreement can be reached relating thereto.

"It is further agreed that upon the completion of the dredge above referred to and described, and when the same shall be ready for operation, a sinking fund of one thousand dollars ($1,000) shall be created to pay the expenses of operation until the plant shall be self-sustaining, by each of the parties hereto contributing five hundred dollars ($500), the residue or remainder of which shall be covered into the treasury of the corporation, which it is the purpose of the parties hereto to incorporate, with all other moneys and earnings accruing to the said corporation."

The answer of the appellant, Ferguson, put in issue the execution by him of the alleged contract, and also denied that the property described in the complaint is the property included and intended to be included in that or any other contract entered into between the parties. In his answer Ferguson admitted the payment by him to Blood and Fulton of $19,500 each, but denied that such payments were made under or in pursuance of the alleged contract, and denies that anything remains due from him under said contract, or at all, or that any demand has been made upon him for such balance, and denies the performance by Blood and Fulton of their part of the alleged contract.

On the trial the defendant Ferguson introduced no evidence, so that the case rests solely upon the plaintiff's proof. By that it appears that in the spring of 1901 the appellee began negotiations with the appellant for the purchase by him of an undivided half interest in certain placer ground owned by the appellee and Fulton, and upon some of which they held options from others. The negotiations culminated

Digitized by Google

in a telegram of date April 18, 1901, from the appellant to the appellee, notifying the latter that in a few days one M. J. Lawlor would arrive, clothed with full authority to act for the appellant in the matter concerning which they had been negotiating. Accordingly. Lawlor met the appellee and Fulton in Denver, and the three then went to Idaho to examine the ground; and, after spending some time in such examination, Lawlor, according to the only evidence in the case, said to Blood and Fulton:

"There is no use prospecting any further; I am satisfied, and now we will go out to Boise and I will make my report to Mr. Ferguson."

He did so, and the three remained in Boise to hear from the appellant. On the 26th day of June, 1901, Lawlor received a telegram from the appellant stating that he would send $1,000 that day, $9,000 in 20 days, $7,000 in 30 days, and the balance in four months, and asking where he could buy machinery. This telegram was shown by Lawlor to the appellee, and $1,000 paid to the latter and Fulton. Lawlor then returned to Shenandoah, Pa., where the appellant resided, and on July 18, 1901, the appellee received from Lawlor a telegram from Shenandoah, Pa., saying:

"Ferguson cannot leave until Tuesday or go farther than Buffalo. Want you to meet us Iroquois Hotel Tuesday evening. Notify Fulton other matter arranged, answer."

And two days later the appellee received from Lawlor another telegram sent from Shenandoah, reading:

"Meet us in Buffalo as requested in former message to sign papers. Have money for both payments, answer."

In response to these telegrams, the appellee went to Buffalo, where he met the appellant in the evening of July 25th, when and where they talked over the matter for some time. The next morning appellant, appellee, and Lawlor met and again went over the matter, when the appellant told the appellee that he could not make the payments as stated in the telegram of June 26th, but that in addition to the $1,000 already paid he would pay $9,000 in 20 days, $7,000 in 30 days, $10,000 in 3 months, and the balance of $13,000 August 15, 1902. The appellee consented to this, and thereupon the appellant dictated the terms of the agreement to be formerly prepared by Lawlor and appellant, saying to his representative, Lawlor:

"You people are competent to draw up this agreement. Have Mr. Blood sign it and acknowledge it, and forward it to my home in Shenandoah, Pennsylvania, and I will sign it and acknowledge it there."

Accordingly, the agreement was drawn up by Lawlor, and signed and acknowledged by the appellee and delivered to Lawlor, who said that he would send it to the appellant for execution—at the same time giving to the appellee a compared copy of the agreement. Later Lawlor went to Idaho, and, with the appellee, examined the county records to ascertain the title of the property that was to be transferred, and, after having some defects cured, expressed himself as satisfied with the title, and thereupon delivered to the appellee two checks signed by the appellant, one for $9,000 and the other for $7,000. All of the

Digitized by Google

other payments provided for by the contract were subsequently made by the appellant except the last, on which he also paid $2,000, leaving a balance unpaid of $11,000.

Blood and Fulton built the dredge provided for by the contract, equipped it, and commenced working the property, the appellant being represented on the ground by Lawlor, and personally spending some time there in the summer of 1902, watching the operations, and making suggestions as to equipment and the place to work. At that time he had paid $37,000 under the contract, and there discussed with the appellee the last payment to be made by him, saying that he was not certain that he could make that payment promptly, but would advise the appellee as soon as he returned to his home. At no time did he intimate that he had not signed the written agreement, and the uncontradicted testimony of the appellee is to the effect that both the appellant, and Lawlor told him that appellant had signed it, and, furthermore, after notice to him to produce the original instrument, the appellant failed to do so at the trial. Under such circumstances he should not be heard to say that the contract was void under the Idaho statute of frauds (Rev. St. 1887) the provisions of which are as follows:

"Sec. 6007. No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

"Sec. 6008. The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.

"Sec. 6009. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents: * * * (5) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

There are several reasons why this contention on the part of the appellant is wholly untenable. In the first place, in view of the appellant's statement to the appellee at Buffalo that he would sign the contract upon its receipt; that the written contract was sent to him by his agent, Lawlor; that he proceeded under the contract as though it had been signed by all the parties thereto, making payments under it, going into possession of the property under it, participating in the development of the property, and conducting himself in all respects as though it was an executed contract, thus leading the appellee to believe that he had signed it, as he stated he would; and considering the further fact that he failed to produce the original at the trial when notified to do so—we think the conclusion inevitable, in the absence of any evidence to the contrary, that he did in fact sign the paper.

Digitized by Google

In the second place, if it be conceded that the statutes above quoted require that such contracts as are here involved be signed by both grantor and grantee, the appellant cannot avail himself of such requirement, in view of the facts here shown, because of section 3225 of the Revised Statutes of 1887 of Idaho, which provides that:

"Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party."

Certainly the appellant, by his conduct, led the appellee to believe that he had signed the contract, and to purchase claims on which he had only options, and to otherwise expend money and time in carrying out the provisions of the agreement. Under such circumstances, to permit the appellant to repudiate the contract on the ground that he did not in fact affix his signature to it, would manifestly be to permit him to practice fraud and deception upon the appellee. Moreover, part performance of a contract takes it out of the statute of frauds. In this case not only was the contract partly, but it was almost completely, performed by the appellant. 26 Enc. of Law, pp. 50–52; Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; Brown v. Sutton, 129 U. S. 238, 9 Sup. Ct. 273, 32 L. Ed. 664; Riggles v. Erney, 154 U. S. 244, 14 Sup. Ct. 1083, 38 L. Ed. 976; Deeds v. Stephens, 69 Pac. 534, 8 Idaho, 514; Fleming v. Backer (Idaho) 85 Pac. 1092; Barton v. Dunlap, 66 Pac. 832, 8 Idaho, 82; Francis v. Green, 65 Pac. 362, 7 Idaho, 668; Male v. Leflang, 63 Pac. 108, 7 Idaho, 348.

Where one contracts to convey real estate to another upon the payment of the agreed price, retaining the title until payment is fully made, it is not very important, in our opinion, what the security so retained is called, whether a trust, a vendor's lien, an equitable mortgage, an equitable security, or any other kind of a lien. Like the Supreme Court of Tennessee:

"We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure the payment of a debt. In both cases, courts of chancery consider the estate only as security for the payment of the debt, upon a discharge of which the debtor is entitled to a conveyance in one instance, and a reconveyance in the other." Graham v. McCampbell, 19 Tenn. 52, 33 Am. Dec. 126.

Where the title is retained by the seller as security for the payment of the debt, the security is, in this country, very generally regarded as possessing all the essential features of a mortgage, and the vendor as standing for all practical purposes as mortgagee in relation to the vendee. See 29 Cyc., pp. 770, 771, and notes; Hardin v. Boyd, 113 U. S. 764, 5 Sup. Ct. 771, 28 L. Ed. 1141; Lewis v. Hawkins, 90 U. S. 126, 23 L. Ed. 113; Wheeling Bridge & T. Ry. Co. v. Reymann Brewing Co., 90 Fed. 189, 32 C. C. A. 571; Seattle L. S. & E. Ry. Co. v. Union Trust Co., 79 Fed. 179, 24 C. C. A. 512; White v. Ewing, 69 Fed. 452, 16 C. C. A. 296. And as such, he seems to be regarded by statute in Idaho. Rev. St. Idaho 1887, §§ 3440, 4520, and 4521. So regarded, there can be no doubt of the power of the court to enter a deficiency

Digitized by Google

judgment, where, as in the present case, the sale of the vendee's interest in the property fails to bring enough to satisfy his debt. Authorities supra.

The judgment is affirmed.

NOTE.

Deficiency Judgments and Personal Liability on Foreclosure of Vendors' Liens.

I. In General.

[a] (Ky. 1889) Where the proceeds of land sold under order of court to satisfy a vendor's lien, and which brings less than two-thirds of its appraised value, are insufficient to satisfy such lien, the vendor may have a decree for the sale of the equity of redemption of the vendee, the rights of third parties not having intervened, under Gen. St. p. 973, § 4, providing that if a judgment, in pursuance of which a sale is made, is not satisfied by such sale, the right of redemption given in such cases may be sold in satisfaction of the residue of such judgment.—Crittenden v. Beck, 10 S. W. 806.

[b] (Neb. 1896) In an executory contract for the sale of land, the vendor may, on default of the vendee, treat the contract as an ordinary real estate mortgage, and foreclose it as such—his right not being limited to a decree against the land alone.—Hendrix v. Barker, 49 Neb. 369, 68 N. W. 531.

[c] (N. C. 1898) Where plaintiff sells land to defendant, and gives bond to make title on payment of the purchase-money notes, and defendant gives him power to sell the land on default in payment of the notes, he can, after selling and applying proceeds on the notes, sue for the balance; the only condition being that when he sold under the power he had good title to the lots.—Battery Park Bank v. Loughran, 122 N. C. 668, 30 S. E. 17.

[d] (Pa. 1844) If a bond and mortgage are given by a vendee to secure the payment of the purchase money of the land sold, it is competent, in an action on the bond, for the vendee to prove that it was a part of the contract of sale that the vendor was to look alone to the property sold as a security for the payment of the purchase money. This proof, however, constitutes no defense to the recovery of a judgment on the bond, but the court will so control the execution of it that it shall not be levied upon any other estate or property of the vendee.—Irwin v. Shoemaker, 8 Watts & S. 75.

[e] (Tenn. 1876) A defect of title to land sold is no defense to a bill to enforce the vendor's lien for unpaid purchase money, though it is to a personal decree against the vendee.—Cohen v. Woollard, 2 Tenn. Ch. 686; Jones v. Fulghum, 3 Tenn. Ch. 193.

[f] (Tex. 1884) A., after selling land to B., accepted a note given by C. to B. for excess of value of such land over that of land exchanged by C., in lieu of B.'s note, and released the lien on the tract sold to B. by A. *Held*, that in the absence of any express waiver A. could enforce his lien against the tract received by B. from C., but could not also recover a judgment against B.—Perry v. Woodson, 61 Tex. 228.

II. Liabilities of Subsequent Grantees.

[a] (U. S. 1880) The assignment and acceptance of a contract for the sale of real property does not make the assignee personally liable for the purchase money due thereon; and, as against him, the vendor's remedy is confined to the enforcement of his lien on the property.—Coos Bay Wagon Co. v. Crocker (C. C.) 4 Fed. 577, 6 Sawy. 574.

[b] (Ala. 1887) Under Code, § 3605, providing that in suits to enforce equitable liens execution may issue for balance due, after a sale of the property subject to such lien, execution cannot issue for the balance unpaid after a sale of property to satisfy a vendor's lien, against a subpurchaser, though with notice of the lien, who did not assume to pay the purchase money due

Digitized by Google

from his vendor, by such a contract as would warrant a judgment at law against him personally therefor.—Teal v. Lewis, 85 Ala. 218, 4 South. 695.

[c] (Ark. 1887) In an action to enforce a vendor's lien securing $1,600, deferred payments, evidenced by P.'s four notes, it appeared that B. sold the land to P., the agent of S. and others, his codefendants; that the deed from P. to S., as "trustee for himself and others," recited that "for the further consideration of $1,600 * * * to be paid to myself or to B. as follows, by said S., trustee, for himself and others"; that, when the first of P.'s notes fell due, S. and his codefendants paid it, and afterwards they executed their obligation in payment of the second note. *Held*, that S. was personally liable to B., but that there was no personal liability on any of his other codefendants for any deficiency after sale of the land.—Benjamin v. Birmingham, 50 Ark. 431, 8 S. W. 183.

[d] (Ill. 1870) When it is sought to enforce a vendor's lien against the grantee of the purchaser, on the ground that he had notice that the purchase money was not paid, the decree should be in rem, not in personam.—Wilson v. Lyon, 51 Ill. 530.

[e] (Mich. 1895) Plaintiff, who was assignee of a contract for the sale of premises against which there were liens for deferred payments, sold the contract to defendants, payments to be made partly in cash and partly in future installments. Defendants contracted with full knowledge of the state of the title. The agreement did not provide that plaintiff should own the title before the time to convey should arrive, and the balance to become due exceeded the amount of the liens against the property. *Held*, that plaintiff was entitled to a sale of the defendants' equitable interest, and a decree for the deficiency due under the contract.—Gray v. Hill, 105 Mich. 189, 63 N. W. 77.

[f] (N. M. 1888) In an action to enforce a vendor's lien against an assignee for value of the original vendee, personal judgment should not be rendered against the assignee.—Bates v. Childers, 4 N. M. (Johns.) 347, 20 Pac. 164.

[g] (N. Y. 1900) Where plaintiff deeded a number of lots to S., who conveyed an undivided one-half interest in them to the defendant, and afterwards, when S. became insolvent, the full title was conveyed to defendant on agreement with plaintiff that he should sell the lots and pay the balance of the purchase money out of the proceeds, and defendant sold one-half the lots without making any such payments, plaintiff was entitled to a vendor's lien on the remaining one-half for the balance due on the purchase money, with interest, and to a personal judgment against defendant for any deficiency.—Carville v. Roosevelt, 53 App. Div. 638, 65 N. Y. Supp. 578.

[h] (Tenn. 1889) Where the grantee of land subject to a vendor's lien covenants in the deed to assume and pay the purchase money due from his grantor, and secured by such lien, such covenant being a part of the consideration for the land, he becomes personally liable to the original vendor for the amount of his incumbrance upon the land.—O'Conner v. O'Conner, 88 Tenn. (4 Pickle) 76, 12 S. W. 447, 7 L. R. A. 33.

[i] (Tex. 1893) A subvendee of land subject, with a larger tract, to a vendor's lien, who has not been made a party to an action to foreclose the lien, is entitled, in a subsequent action to remedy the defect, to have the land remaining in the hands of the original vendee sold before his parcel is subjected to the payment of the debt; and it is error to render a money judgment against the subvendee for the difference between the value of the parcel still owned by the original vendee and the amount of the unpaid price, without ordering a sale of either parcel.—Elmendorf v. Beirne, 4 Tex. Civ. App. 188, 23 S. W. 315.

III. Personal Judgment or Decree for Debt.

[a] (Fla. 1903) Equity rule 89, providing for the entry of a deficiency decree, applies only to suits for foreclosure of mortgages, and does not apply to a bill to foreclose a vendor's lien.—Johnson v. McKinnon, 45 Fla. 388, 34 South. 272.

[b] (Ga. 1896) A decree may be entered under Code Ala. § 3605, in a proceeding to enforce a vendor's lien, in the nature of a general judgment against

Digitized by Google

the vendee for the balance of the price remaining unpaid after a sale under the original decree of foreclosure, though complainant's bill, after specifically praying for the foreclosure, contains no other prayer except one for general relief.—Tompkins v. Cooper, 97 Ga. 631, 25 S. E. 247.

[c] (Ga. 1896) Under Code Ala. § 3605, declaring that, in suits for the enforcement of equitable liens, execution may issue for the balance found due after a sale of the property decreed to be sold, it is proper for a court of chancery in that state, on a proceeding by a vendor of land against the vendee to enforce the equitable lien for the price, to enter a decree in the nature of a general judgment against the vendee for the balance of the purchase money remaining unpaid after a sale under the original decree of foreclosure.—Tompkins v. Cooper, 97 Ga. 631, 25 S. E. 247.

[d] (Ind. 1883) A parent, in consideration of love and affection and $300, conveyed by recorded deed a parcel of land to a son, he promising to pay $300 to another son when the latter attained his majority. *Held* a lien on the land, which could be enforced against purchasers; and that a personal judgment for the amount was properly rendered against the original grantee at the suit of the other son.—Pruitt v. Pruitt, 91 Ind. 595.

[e] (Ky. 1866) A decree in personam, in an action against a nonresident to enforce a lien on land for the purchase money, is erroneous.—Jackson v. Speed, 63 Ky. (2 Duv.) 426.

[f] (Miss. 1858) Upon a bill to enforce a vendor's lien for purchase money, the fact that the title to the land is doubtful does not justify the entry of a decree in personam, if the land should prove insufficient.—Cobb v. Duke, 36 Miss. 60, 72 Am. Dec. 157.

[g] (Neb. 1897) Where, after a sale of property under a decree foreclosing a contract of sale, a formal petition is filed for a deficiency judgment, and the party liable therefor files an answer to such petition, the district court has jurisdiction, and, unless a jury be demanded, may itself try and determine the issues presented by such pleadings.—Kloke v. Gardels, 52 Neb. 117, 71 N. W. 955.

[h] (Neb. 1897) Where suit is brought to foreclose as a mortgage an executory contract for the sale of real estate, decree rendered, real estate sold, and the proceeds applied on the amount found due, on the hearing of an application for personal judgment for deficiency against the vendee, neither party can relitigate any material issue determined by such decree.—Kloke v. Gardels, 52 Neb. 117, 71 N. W. 955.

[i] (Tenn. 1892) In a suit to foreclose a vendor's lien, a pecuniary recovery against defendant is not essential to the validity of a decree and sale of the land.—Watkins v. Clifton Hill Land Co., 91 Tenn. (7 Pickle) 683, 20 S. W. 246.

[j] (Tex. 1884) Where a vendor's lien on land is foreclosed, a judgment which directs that in case of a deficiency execution issue for the balance due is correct.—Alford v. Wilson, 62 Tex. 484.

[k] (Tex. 1894) In an action to recover upon a note and to foreclose a vendor's lien, where it was neither alleged nor shown that the occupant of the land was liable on the note, it was error to render a personal judgment against him.—Spence v. Morris (Civ. App.) 28 S. W. 405.

[l] (Va. 1896) In a suit to enforce a vendor's lien, complainant is entitled to a personal judgment for the full amount of the unpaid purchase price, and not merely for the balance remaining due after crediting the proceeds from the sale of the land.—Fayette Land Co. v. Louisville & N. R. Co., 93 Va. 274, 24 S. E. 1016.

[m] (Va. 1896) In an action to enforce a vendor's lien, there may be a personal decree for the purchase money before the sale.—Dellinger v. Foltz, 93 Va. 729, 25 S. E. 998.

[n] (W. Va. 1885) In a suit to enforce a vendor's lien, plaintiff may have a personal decree against the purchasers for the balance of the purchase money due without waiting for its collection from the land.—Carskadon v. Minke, 26 W. Va. 729.

IV. Execution for Deficiency.

[a] (Ala. 1898) Under Code 1896, § 859 (Code 1886, § 3605), providing for the issuance of executions in suits for the enforcement of equitable liens,

Digitized by Google

an execution may issue for a balance remaining after a sale of property under a vendor's lien.—Merrell v. Witherby, 120 Ala. 418, 23 South. 994, 74 Am. St. Rep. 39.

[b] (Tex. 1853) Where a vendor retains a lien on the land for the purchase money, and sues for the purchase money, he is entitled to an order to sell the land to satisfy the judgment, and to execution for the balance.—Bridge v. Young, 9 Tex. 401.

(153 Fed. 537.)

FILES v. RANKIN.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1907.)

No. 2,441.

1. SALES—RIGHT OF RESCISSION—FRAUDULENT CONCEALMENT OF FACTS BY PURCHASER.

While a purchaser, who stands on an equal footing with the seller as to access to means of obtaining knowledge of the value of the thing sold, is not bound to disclose any knowledge he may have on the subject, if in addition to keeping silent as to such knowledge he makes any statement which tends affirmatively to the suppression of the truth, or is calculated to deceive the seller, or to distract his attention from the real facts, his concealment becomes fraudulent, and will afford ground for a rescission of the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 89, 92, 100.]

2. SAME.

Defendant purchased from the receiver of a national bank for $25 a judgment held by the bank against a deceased debtor amounting to over $9,000. At the time of the sale, the bank held, as collateral to the judgment, an assignment of a claim in favor of the debtor against an insolvent firm whose assets were being administered by the court, which was of considerable value, and on which a dividend had been declared and was then payable, amounting to nearly $900. Defendant knew of this collateral, but the receiver did not, having succeeded prior receivers who had lost the evidence of the transfer, and there being nothing on the receivers' books to put him on inquiry. Nor did the record in the insolvency case show that the bank was the owner of the claim. The receiver lived at a distance, and the negotiations for the purchase were conducted by correspondence, in which defendant made no mention of the collateral, but stated his understanding that the debtor had died insolvent after going through bankruptcy, and suggested that the claim would soon be barred by limitation, and that if handled at once a small sum might be realized, but even that was very doubtful. *Held*, that such statements and suggestions amounted to an active and fraudulent concealment of the facts, and entitled the receiver to a rescission of the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 89, 91, 92, 100.]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Since this case was here on the former appeal (Files v. Brown, 59 C. C. A. 403, 124 Fed. 133, to which reference is made for a general statement of the facts), the receiver has amended his petition and placed his right of recovery upon different grounds than before. This cause of action then was and now is an equitable one to set aside an administrative order made in the court below in the matter of the receivership of the First National Bank of Little Rock then pending in the court, authorizing the receiver of that bank to sell a cer-

Digitized by Google

tain judgment for $9,230.09 in its favor against one Kelso to defendant Files for $25 and to rescind the sale made by the receiver pursuant to the terms of that order. Thereafter, and before defendant had taken any steps to realize on the judgment, the receiver filed his motion in the nature of a bill in equity to set aside the sale on the grounds of inadequacy of consideration and failure by Files to impart to the receiver knowledge which he possessed of the existence and value of certain collaterals held by the bank as security for the payment of the judgment. We held on the former appeal that neither inadequacy of consideration alone nor silence by the vendee as to his knowledge of the character or value of the thing sold warranted rescission of the contract, and to those propositions we still adhere; but we ordered the case remanded, with instructions to allow the receiver to amend his petition and to set up other facts, if such there were, which might entitle him to the equitable relief sought. Later an amended petition was filed in which it was charged that the bank held as collateral security for the payment of its judgment against Kelso three notes executed by Thomas H. Allen & Co. of Memphis, and payable to Kelso, aggregating about $9,000; that the maker of the last-mentioned notes had failed in business, and its estate was being administered in the court below for the benefit of its creditors; that before the sale of the Kelso judgment to defendant an order of distribution of 11 per cent. on all allowed claims against the estate of Allen & Co., among which was one in favor of the First National Bank on its notes held as collateral for the payment of the Kelso judgment, had been passed and by reason thereof a dividend of $989.70 was then due and payable to the receiver of the bank, and other money and property were then in the hands of the receiver of the estate of Allen & Co. sufficient to pay in all about $3,600 on the collateral so held by the bank; that while negotiations were pending for the sale of the judgment to defendant neither the receiver nor the Comptroller of the Currency, under whom he was acting, had any knowledge that the Kelso judgment was secured by the collateral mentioned, but that defendant was fully cognizant thereof, and instead of observing silence with respect thereto, as originally charged, he, with the purpose of securing the judgment for a nominal sum made statements and representations concerning the character and value of the judgment to the receiver which were false, fraudulent, misleading, and deceptive, and which did mislead and deceive him into selling the judgment for the inadequate sum of $25. Defendant in his answer to the petition, after denying that he made any false and fraudulent statements, alleged as follows:

"The defendant further says that at the time he purchased the judgment in controversy he believed that said judgment was secured by a collateral claim against the estate of Thomas H. Allen & Co., but he did not know it, and his information was meager and unsatisfactory. He had also been informed that there were assets in the hands of the receiver of said estate for the creditors thereof, but he has never examined the records to see what dividend, if any, had been declared."

The proof fully establishes the allegation last quoted, and in our opinion goes further and discloses that defendant not only believed that the judgment was secured by collateral, but that he knew it at the time he made the purchase in question. It establishes that some time before the sale of the judgment to defendant his attorney had seen and conversed with the receiver of Allen & Co. concerning the claim of the bank against the estate of Allen & Co., and that about the time of the purchase defendant and his attorney called on him and notified him that the bank had recovered a judgment against Kelso which had been purchased by defendant, and, as the claim of the bank against the estate was held by it as collateral security for the payment of that judgment, that he (defendant), as owner thereof, was the owner of the claim against the estate.

The evidence in the case, with the admissions found in defendant's answer, taken in connection with the fact that Files did not testify in his own behalf, satisfy us that he knew in the fall of 1902, while negotiating for the purchase of the judgment, that it was secured by the collateral in question, and that such collateral was of considerable value.

At a public sale of assets of the bank held in 1899, the judgment was offered for sale, but no bid was made for it, and it remained undisposed of.

Digitized by Google

Cockrill, the original receiver, resigned soon thereafter. Mr. Auten succeeded him and served for a short time, after which E. F. Brown succeeded him. Some time before Cockrill resigned, but how long the record does not disclose, the certificates of allowance in favor of Kelso which had been assigned to the bank were lost or misplaced, and as a result they were not turned over to his successors in the receivership; neither was there any memorandum or item in the books of the receivership showing the fact that the bank, held by assignment or otherwise, Kelso's certificates of allowance against the estate of Allen & Co., so that neither Auten nor Brown had any actual knowledge of that fact. The records in the case of Houchens v. Thomas H. Allen & Co., in which the affairs of the latter company were being administered, would have disclosed that Kelso had three allowances against the estate, and that certificates of such allowances had been made to him, but they would not have disclosed that Kelso had assigned them to the First National Bank. It was in 1902, a year after Brown became receiver, that negotiations were entered upon by defendant for the purchase of the Kelso judgment. Brown resided in Chicago, the Comptroller of the Currency was in Washington, and negotiations for the purchase were conducted by correspondence. Defendant opened the correspondence by inquiring of the Comptroller if the judgment was for sale. He was referred to Brown, the receiver, to whom he on August 27, 1902, wrote, suggesting that possibly he, by reason of being the owner of some of Kelso's notes, might have some interest in the judgment, and saying:

"If I could control the whole judgment I think there is a bare possibility of securing a small amount in the way of dividends. As it is I am likely to get nothing. I am willing to pay a nominal sum for the bank's interest, which is, say, two-thirds, or thereabouts."

It is not now pretended that defendant had any interest in the judgment sold. Neither is it contended that his representations to Brown were intentional misrepresentations about that matter. After some correspondence defendant offered $25 for the judgment. That offer was rejected, and the Comptroller on September 15, 1902, directed receiver Brown to dispose of the judgment at public auction at the termination of his receivership. Nothing more was done in the matter until October 6th, when defendant reopened negotiations by writing the following letter to receiver Brown:

"Dear Sir: Your letter to H. F. Auten, Esq., inclosing a letter from the Comptroller of the Currency, of date September 15, 1902, in regard to the offer of $25.00 by me for a judgment in favor of the First National Bank against J. G. Kelso, deceased, in the United States court at Texarkana, has been shown to me by Mr. Auten. I note that the Comptroller declines the offer, and directs you to sell the judgment at public auction at the time you terminate your receivership. Mr. Auten advises me that it will be impossible to close the litigation under two years, perhaps longer, and as this claim will be barred by the statute of limitation within a short time, and thus whatever value it might have, if any, be lost, permit me to suggest that a sale now, at public auction, or otherwise would give the purchaser the benefit of whatever value it might have. At a sale two or more years from now it would probably go off like it did at the former sale—'No bidders,' hence no sale. My understanding is that Mr. Kelso went through bankruptcy and died insolvent. Hence you will see that if any value attaches now it would be lost by a delay of two or three years. If it could be handled at once, a small sum might be realized, but even that is very doubtful, and unless sold at once, or in the very near future, it will be valueless. I own about one-third of the judgment, bought it with other assets at receiver's sale, December 11, 1899, and if I didn't own that interest I wouldn't care to bother with the matter. Kindly submit the matter to the Comptroller as to an early sale, and advise me of his conclusion in the premises. Very truly yours, [Signed] A. W. Files."

The letter was forwarded to the Comptroller, who authorized the receiver to use his discretion. That officer finally relying upon the representations and statements found in the letters of August 27th and October 6th, and with no personal knowledge of the value of the judgment, concluded a sale to defendant for $25, and secured an order of the court permitting him to assign the judgment for that consideration. A decree rescinding the sale was rendered by the Circuit Court, and it is from such decree that this appeal is prosecuted.

Digitized by Google

W. S. McKain, for appellant.
Moore, Smith & Moore, for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge, after stating the case delivered the opinion of the court.

It is first contended by defendant that he and receiver Brown stood on an equal footing; that Brown knew, or by the exercise of ordinary care could have known, as much about the value of the judgment as he knew; and that in such circumstances the receiver had no right to rely upon any fraudulent representation or concealment which he (defendant) might have practiced. On the facts so assumed the proposition of law contended for cannot be disputed. It is well settled that where the means of knowledge are at hand and equally available to both parties, and where a party, instead of resorting to them, sees fit to confide in the statements of one whose interest it is to mislead him, the law will afford him no redress against his own imprudent confidence. Cooley on Torts, *p. 487; Slaughter's Adm'r v. Gerson, 13 Wall. 379, 20 L. Ed. 627; Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931; Yeates v. Pryor, 11 Ark. 58; Hill v. Bush, 19 Ark. 528. But in the light of the pleadings and proof we are unable to view the facts as claimed. Defendant knew that the allowed claims of Kelso against the Allen estate stood pledged as collateral for the payment of the Kelso judgment, and he knew that they were of considerable value. Of those facts Brown knew nothing. Neither did his immediate predecessor have any knowledge. What Cockrill, the first receiver, knew concerning them, is not disclosed; but it is a fact that, when he offered the assets of the bank at public auction in 1899, no one considered the judgment of any value. It was offered for sale, but no bid was received for it. If he then or subsequently had the assignments of Kelso's allowances against the Allen estate in his possession, they doubtless were considered of no value. They certainly disappeared, and neither they nor any memorandum of them were ever transmitted to his successors to evidence any claim of right on the part of the bank against the Allen estate. The testimony of both Brown and his predecessor, Auten, to the effect that they had no knowledge of the existence of any such claim, stands uncontradicted. But it is said that Brown could have acquired accurate information by investigating the means at hand and available to him for that purpose. It is claimed that, if he had investigated the records of Houchens v. Allen & Co., and made inquiries of the receiver in charge of the estate of that company, he could and would have ascertained the truth. We are unable to perceive, in the absence of anything in his own records, or in his own possession to suggest investigating the Houchens Case, what should have moved him to make an investigation of that any more than any other case; but suppose reasonable diligence would have put him upon some inquiry in that case, and suppose he would have discovered that certain allowances had been made in favor of Kelso, we do not perceive how that fact would have given

Digitized by Google

him any knowledge or suggestion that Kelso had assigned the claim to the bank as security for the payment of his judgment. From all the evidence we are unable to find that any such opportunities for information were open to Brown as would have put a reasonably prudent person upon inquiry concerning the facts which gave the Kelso judgment exceptional value.

This brings us to a consideration of the contents of the two letters of August 27th and October 6th, written to the receiver Brown by defendant and of their legal effect upon the transaction in question.

Defendant, with the knowledge possessed by him of the value of the judgment, was dealing with a person residing at a distance. He desired to buy the judgment. However full his information might be, he was under no obligation in law to impart that knowledge to the owner of the judgment. Files v. Brown, 124 Fed. 133, 59 C. C. A. 403. Standing in no fiduciary relation to him, and owing him no duty to make disclosure of his information, he might have observed strict silence on the subject and have reaped the full advantage which his diligence in securing information gave him; but any activity on his part, which directly or indirectly tended to put the vendor off his guard or mislead him to his injury, would afford ground for the rescission of the sale.

In Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214, Chief Justice Marshall stated the case and delivered the opinion of the court, as follows:

"The question in this case is whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of opinion, that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within the proper limits, where the means of intelligence are equally accessible to both parties. But at the same time, each party must take care not to say or do anything tending to impose upon the other."

Lord Eldon, in Turner v. Harvey, Jacob's Reports, 178, after declaring the purchaser's right in general to keep silence, said as follows:

"Very little is sufficient to affect the application of that principle. If a word, if a single word, be dropped which tends to mislead the vendor, that principle will not be allowed to operate."

Pomeroy, in his work on Equity Jurisprudence (volume 2, § 901), after laying down the rule that in cases unaffected by fiduciary relations silence by one of the contracting parties having a peculiar knowledge of the subject may be observed with impunity, makes the following statement:

"If, in addition to the party's silence, there is any statement, even any word or act on his part, which tends affirmatively to suppression of the truth, to a covering up or disguising the truth or to a withdrawal or distraction of the party's attention or observation from the real facts, then the line is overstepped, and the concealment becomes fraudulent."

Story, in his work on Sales ([4th Ed.] §§ 175, 177), observes as follows:

"If a vendee have private information with regard to any extrinsic fact or event, which materially affects the value of the subject-matter of sale, he would

Digitized by Google

not be legally bound to divulge it, unless a special trust were either expressly or impliedly reposed in him. * * * Such cases are, however, closely scrutinized, and it behooves a person taking such an advantage to be careful lest he say anything which is calculated in the slightest degree to mislead, for the smallest fraud is sufficient to poison a contract. * * * If there be any studied efforts [on the part of either party to a contract of sale] to prevent the other from coming to any knowledge relating to the sale and, especially if there be any false suggestion or representation, however slight, the transaction will be fraudulent and void."

Applying the foregoing well-established principles to the facts of this case, we cannot escape the conviction that defendant did not observe that indifferent attitude toward the transaction which was required of him. There seems to have been a covert attempt on his part to attract the receiver's attention to all the facts which minimized the value of the judgment and to turn his attention from those which magnified that value.

Defendant had some time in September, 1902, offered $25 for the judgment at private sale. The Comptroller declined to sanction the sale for that sum, and so advised the receiver, and directed him to dispose of the judgment at public auction at the termination of his receivership. It is in the light of all these facts that the letter of October 6th should be considered. Defendant wanted to buy the judgment, had made an offer for it which had been rejected, and negotiations had apparently closed. Upon the determination of the Comptroller to sell it at public auction, defendant volunteered his good services. In the letter of October 6th he gratuitously suggests that the sale of the judgment at public auction at the time of the termination of the receivership would postpone it so long that the statute of limitations might bar recovery upon it. He incidently alludes to Kelso's death, insolvency, and bankruptcy, and says:

"Permit me to suggest that a sale now at public auction or otherwise would give the purchaser the benefit of whatever value it might have. * * * If any value attaches now it would be lost by delay of two or three years. * * * If it could be handled at once, a small sum might be realized; but even that is very doubtful. Kindly submit the matter to the comptroller," etc.

That letter, by its suggestive references to the death, insolvency, and bankruptcy of Kelso, to the worthlessness of the judgment and to the need of hasty action to realize even a small sum and prevent the bar of the statute of limitations, went far beyond that silence which the law under the circumstances permitted defendant to indulge. He had knowledge of the value of the judgment which he artfully concealed. His suggestions were well calculated to divert the mind of the vendor from inquiring concerning the value of the judgment, to forestall the public auction and secure acceptance of his once rejected offer. The receiver acted upon them, accepted the original offer, and closed the sale.

Counsel for appellant invokes the principle that mere expressions of opinion as distinguished from statements of fact are not actionable. That proposition may be conceded, but from what has already been said there is more in this case than that. There was such an artful concealment of facts by the purchaser as was calculated to and did mislead the seller, throw him off his guard, and prevent his

Digitized by Google

making an independent investigation as to the value of the subject of sale. Under the authorities cited, this, without more, is enough to warrant a rescission of the sale.

The case was tried below in harmony with the principles now announced, and the decree as rendered is affirmed.

(153 Fed. 543.)

NEW YORK, N. H. & H. R. CO. v. DE NOYELLES.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 706.

1. COLLISION—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to plaintiff by a collision between defendant tug and one of several floats attached to a dock, whether plaintiff was negligent *held* for the jury.

2. SAME—NEGLIGENCE.

Defendant tug while going up a river to defendant's coal dock, which was located just below the dock to which plaintiff's boat was moored, collided with the outer of several floats attached to such dock, and the shock being communicated to each plaintiff was caught and injured as he was standing on a stringer in front of the bulkhead of the dock. The maneuver executed by the tug at the time of the collision was the usual one apart from the degree of violence of the contact, and it also appeared that the master of the tug, by reason of intervening cars on one of the floats, and plaintiff's stooping posture, could not have seen him, and did not know of his dangerous position. *Held*, that the master of the transfer was not negligent in adopting the maneuver executed at the time of the collision, nor in failing to discover plaintiff's presence either just prior to the collision or as the tug was approaching the dock at a time when plaintiff was in a place of safety.

3. SAME—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to plaintiff in a collision between defendant's tug and a series of floats attached to a dock, whether the master was negligent in causing his tug to come in violent contact with one of the floats without knowing that persons were not working in or around them, *held* for the jury.

In Error to the Circuit Court of the United States for the Northern District of New York.

Writ of error by defendant below to review judgment of the United States Circuit Court for the Northern District of New York, entered upon a verdict in favor of plaintiff below, for $20,134.26 for personal injuries. The undisputed facts material to the issues presented herein are as follows: The defendant is the owner of a dock known as the "fish dock," on the east side of the Harlem river, above the Willis Avenue Bridge. The river at this point is about 400 feet wide. At said dock there is a bulkhead with piles for mooring vessels. Outside of the bulkhead there are spring fender piles bowed and keyed into stringers stretched along the outer edge of the bulkhead. There are three rows of these stringers eight or ten inches wide, and so located the one above the other that a person may step down on them from the bulkhead. The plaintiff was captain of a barge, and on the night before the accident had brought her to said bulkhead at the fish dock and had discharged his cargo. During the night a scow loaded with ashes, a car float loaded with cars, one of defendant's tugs, and another float loaded with cars, all belonging to defendant, had come up alongside of plaintiff's barge in the order stated, and lay there lashed together and to each other in the usual way. In the morning, while the plaintiff was waiting for a tug boat to take him away, he discovered that the breast line on the starboard bow of his barge had slipped down on the

Digitized by Google

spile, and the knot was jammed in between the spile and the barge so that he could not haul it out. He called on his deck hand to assist him and to pry out the barge from the spile, and stepped down on the lower one of the three stringers, and while standing, either with one foot on the rail of the boat and one on the stringer, or with both feet on the stringer, and stooping over to reach for and pull up the line, he was thrown down between the bulkhead and the barge by the shock of the barge striking the bulkhead, and caught on a stub on the dock, and while in this position was again struck and crushed and seriously injured. The conditions leading up to and causing this damage were as follows: Just prior to the accident, the defendant's tug, Transfer No. 4, 92 feet long, was coming up the river, bound for the defendant's coal and water dock located just below the fish dock. The tide was setting up the river. The boats at the fish dock projected out over 100 feet, and on the opposite side of the river lay a schooner and hoister projecting out about 35 feet. In order to round to against the tide, so as to enter the coal and water dock, the master of the Transfer No. 4 stopped his boat after he cleared the Willis Avenue Bridge, ported her helm, then backed and filled so as to let her stern swing up with the tide, went ahead so as to bring her bow against the side of the outside float, and then, while her stern was swinging up river with the tide, he worked along the edge of the float toward the coal and water dock. The impact caused by the striking of this Transfer No. 4 against said float, and communicated through the intervening boats to plaintiff's boat and the dock, caused the plaintiff to fall and receive the injuries complained of.

H. G. Ward and William Greenough, for plaintiff in error.

R. J. Donavan and Herbert D. Cohen, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The single assignment of error challenges the action of the trial judge in refusing to direct a verdict for the defendant on the ground either that the defendant was not in fault, or, even if in fault, that plaintiff's fault contributed to cause the injury.

The contention of contributory negligence need not be discussed. The plaintiff, it is true, when he saw the approaching boat 100 feet away, was in a place of safety, and he put himself in a perilous position where apparently he would be likely to be injured by a very slight jar or disturbance of the water. But this question was one peculiarly for the jury, the burden of proof was upon the defendant, the facts were fairly submitted to them in a charge to which no exception was taken, and their verdict is conclusive upon this point.

A more serious question is presented upon the contention that no negligence has been shown on the part of the defendant. The maneuver executed by the master of Transfer No. 4 appears to have been a usual one in such conditions when it is necessary, and, barring the question of the violence of the jar in contacting with the float, seems to have been properly performed. There is considerable testimony to the effect that that was the only practicable way in which to reach the coal dock with this boat in a flood tide and with the accumulation of boats at this point.

Furthermore, we find no negligence in the fact that the master of the transfer did not see the plaintiff at the time of the collision. The evidence shows that he was in a position where he could not be seen from the transfer. The plaintiff himself testifies as follows:

"I could not look over the cars. She went past the cars. I could not see it, as the cars were between me and the transfer, until after she went by them.

Digitized by Google

From the place where I stood, I could not see the boat. The Transfer I saw coming up the river, after she passed the line of freight cars on that float. Then I could see her after that. I could not see it when it was behind that line of cars; but after she passed I could."

And it appears further from his testimony that at the time of the accident he was stooping over so far, in order to get at the line, that probably his body was out of sight.

Nor do we find any negligence on the part of the master of the Transfer by reason of the claim that he could have seen plaintiff when the Transfer was coming up the river, for the plaintiff at that time was in a place of safety. As he says:

"I was standing on the string piece. I hadn't stepped down between the boat. I was standing on the string piece when I got hit. When I looked down the river and saw the Transfer, I was on the bow of my boat; on the deck. We were just starting to get the rope up with the pike pole. We had tried it with a pike pole, and were just going to try the other way. At that time the Transfer was headed right up the river, and was, I should judge, about the length of 100 feet from me. * * * She was, I should judge, about 100 feet—not from me, but from the railroad float. She was further out in the river towards the railroad float. She was not opposite the railroad float. The tug was below the railroad float. She was coming up towards the railroad float, outside. She was about 100 feet below the railroad float."

Nor do we find any negligence in the failure of the master of the transfer to give any signal by means of whistles or bells. There are no rules of navigation which provide how warning of such a maneuver shall be given.

It is further immaterial whether upon the whole case we would have been disposed to hold that the master of the Transfer was guilty of negligence, or that the impact of the blow upon the outside float was not of such force as to raise a presumption of negligence. It may well be that the disturbance caused by such impact was no greater than the displacement which would have resulted from the waves and swell caused by such a tug in passing along up the river without stopping, or in maneuvering to enter the coal and water dock without coming in contact with any other boat. The sole question presented to us upon this record is whether there was any such evidence of negligence to go to the jury as would be sufficient to justify them in finding that the agents of defendant were negligent.

It appears from the record that defendant's agents knew that there were people living and working on and about these boats, and that, if a moving boat came in violent contact with them, it might cause injury to such persons. And, while there is considerable testimony to the effect that this blow was so slight that it could not have been communicated through the whole flotilla of boats to the place where the plaintiff was standing with such violence as to throw him down in the manner described, yet we are not at liberty to ignore the testimony of the plaintiff and mate on this point. The plaintiff testified that the first crash knocked his feet from under him. His condition sufficiently indicates the violence of the second shock.

The testimony of the mate on this point was as follows:

"I was standing on my feet. I was helping the captain. I did not have hold of anything when I fell down. I felt a jar. It affected me as if I was going down. I went. It threw me. It felt like a hard shock. It pitched me for-

Digitized by Google

ward about two and a half feet. I was on the deck of the boat. I was half of me off the boat—some on the boat and some over. I had to catch onto something. I catched onto the dock. That prevented me from falling. I heard the crash. I could not say where that was. * * * This noise which I heard was towards the river. As I was pitched forward, I fell on my hands. The deck, in reference to the dock, was pretty much near level. I lay there flat. I answered the court that I caught on the dock, or I would have fallen. But I fell. But I would have fallen into the river if it had not been for the dock."

It appears, furthermore, from the testimony of the witnesses for defendant that it is the duty of such boats, when about to execute such a maneuver, to have lookouts to notify the master if there are people working in and around the boats, and that, if the lookouts on this occasion had seen any one on the boats, they would have notified the captain, and "in that case he certainly would not have run up against them." And the experienced master of one of defendant's transfers, which was lying at the dock at the time of the collision, testified in regard to the custom in the execution of such a maneuver as follows:

"As a matter of precaution, as a matter of safety to the boats I am coming up against, I have to bring my boat in touch with the adjoining boats in such manner as not to throw any one down, or break anything."

It appears, further, that the gross tonnage of the Transfer was 102 tons.

In these circumstances, the question of defendant's negligence was submitted to the jury by the court upon an exhaustive consideration of the evidence and a fair and correct statement of the law applicable thereto, and to which no exception is urged.

We are, therefore, concluded by the verdict of the jury, and the judgment thereon must be affirmed.

NOTE.—The following is the opinion of Ray, District Judge, on motion to set aside a verdict:

RAY, District Judge. No point or question is raised that there was any error in the admission or rejection of evidence or in the charge to the jury. Under all the evidence in the case a fair question of negligence and of freedom from contributory negligence was presented for the determination of the jury. The plaintiff was very severely crushed and injured from his shoulders to his feet inclusive, and these injuries are permanent, and plaintiff will never be any better or free from pain. In all human probability he will grow worse. He will never be able to dress and undress himself, or do any labor except light work with his hands. Considering his age and his earning power both before and since the accident, and the nature and permanence of his injuries, the damages awarded were not excessive; indeed, they were moderate. There was an abundance of evidence to sustain a finding of negligence on the part of the captain of the defendant's tug that ran against the floats and jammed them against the canal boat of the plaintiff where he was at work with his mate in plain sight of the captain of the tug that did the damage going up the Harlem river. If the captain did not see them, he ought to have seen them. He had an abundance of sea room in which to maneuver and turn his tug, and evidently could have run into the water and coal dock without coming in collision with the floats had he regarded it of moment or importance so to do. His evidence disclosed that he was ignorant, self-opinionated, cold-blooded, and reckless. He ran into the line of boats moored to this wharf, the canal boat next it, then the scow, and then defendant's heavily loaded floats with another tug between, recklessly and with great and unnecessary force in any event and with an utter disregard of the safety of those on and about those vessels. The evidence of Samuel Sprague, a witness for defendant, shows

Digitized by Google

the captain of the tug in question did what he ought not to have done. The evidence tended to show the collision was exceedingly severe and then persisted in. The evidence of John Johnson, a witness for defendant, and who was on the tug, shows it was the duty of those thereon to keep a lookout for people on or about boats tied to the wharf and those tied thereto outside, and, if any one was there, not to come in collision. Still the captain of the tug said, in substance, the only purpose of a watch or lookout was to enable them to testify how the injury was done in case of a collision and resulting damage and not to enable him or make it his duty not to come in collision with vessels tied to a dock. The captain of this tug testified as to the purpose of the watch on the tug for persons on vessels tied to a dock:

"Q. What did you keep a lookout for? What was the reason for your keeping a lookout? A. It is the rule that we should carry a lookout; that is all the reason I can give you. In case of accident in case of collision, that a man should be there on the bow of the boat to see just what is met with; that is the only reason I can give you for a lookout. Q. Let me see if I understand you. The reason for your keeping a lookout was in case you injured somebody, that you might be able to tell about it? A. Yes, sir. Q. So you might be a witness? A. That is what they are stationed out there for. Q. They are not stationed there for the purpose of warning men of your approach or preventing a collision? A. No, sir. Q. They are simply put there for the purpose in case you do run a man down, and he is drowned, you may be able to testify you saw him go down? A. Yes, sir. Q. That he went down? A. Yes, sir. Q. How you came to put him down? A. Yes, sir."

This was contrary to the credible evidence in the case. The captain of this tug gave no warning of his approach or that he was intending or expected to strike this fleet of boats—plaintiff's canal boat innermost and next the dock. The plaintiff was not down between the dock and boat, but standing with his whole body from the hips up in plain view of those on the tug. The collision threw the canal boat against him, and caused him to fall down between the boat and dock, and a second surge of the boat caused by another blow of the tug crushed him. Before getting in this position he looked up and down and saw this tug going up the Harlem river in midstream and nothing to indicate it would or was intending to come in collision. He had no reason to apprehend this tug would go up, turn, and then butt head on into this line of boats. The jury was amply justified in finding absence of contributory negligence, which, indeed, was not pleaded until during the trial by amendment there allowed. All these questions were for the jury. The case was not tried or submitted on any theory that there was any presumption of negligence on the part of defendant arising from the fact of the collision and injury.

The verdict was fully justified, and the motion for a new trial is denied.

(153 Fed. 547.)

McCONNELL v. DENNIS et al.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1907.)

No. 2,488.

1. INJUNCTION—ACTIONS—NECESSARY PARTIES—DEFENDANTS.

In a suit in equity in a federal court to enjoin the defendant from proceeding under an oil and gas lease which obligated him to operate for oil and gas for a term of years, and to pay royalties in kind and in cash to the owner of the land, the right of complainant to relief being based on the alleged invalidity of such lease, the landowner is an indispensable party, without whose presence the court can make no decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 212.]

2. APPEAL—MATTERS REVIEWABLE—DEFECT OF PARTIES.

Where a decree was entered in favor of a complainant in a suit in which because of the absence of an indispensable party whose rights were directly affected the court was not warranted in granting any relief, the de-

Digitized by Google

fect of parties cannot be waived by the parties before the court, and the fact that no objection was made on that ground cannot prevent the consideration of the question by an appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1189; vol. 37, Parties, § 169.]

Appeal from the Circuit Court of the United States for the District of Kansas.

L. W. Keplinger (J. B. Ziegler, on the brief), for appellant.
W. H. Sproul and John H. Atwood, for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This case presents a controversy between two rival claimants to the mining rights in 320 acres of oil land situated in Chautauqua county, Kan. Prior to July, 1902, Amanda Miller, of California, owned the land. By a deed dated July 21, 1902, recorded in the office of the register of deeds of Chautauqua county on August 25, 1903, she conveyed it to Abba Clair McCready, who, on August 25, 1903, by an instrument duly recorded on August 28, 1903, leased the oil, gas, and mining rights on the land to P. D. McConnell, the defendant herein. There were reserved to the lessor as rent or royalties one-sixth interest in all the oil that might be produced from the premises and also $200 per year for each and every gas well sunk and successfully operated thereon. By an instrument dated September 18, 1902, Amanda Miller leased the same land to complainants, Dennis and others, who constituted a copartnership under the name of the Sedan Development Company. This lease in terms conferred upon the lessees an exclusive right to conduct mining operations for gas or oil on the leased premises and reserved to the lessor royalties in the event gas wells should be sunk, at the rate of $5 per month during the time product of value should be taken therefrom or in lieu thereof one-tenth of the oil or other product found therein, and until wells should be sunk the sum of $32 per year fixed, with some alternative provisions. This lease was recorded in the proper registration office February 3, 1903, and is assailed by defendant as void because unequal, uncertain, unfair, and unilateral in its covenants and for other reasons.

Complainants in their bill filed for equitable relief allege their ownership of the lease acquired from Amanda Miller, their possession of the land, and their exclusive right to mine and drill for oil, gas, and minerals. They further allege that defendant McConnell and others named as having some undescribed interest in the land, without consent of the complainants, entered upon the premises with tools, machinery, and other preparation for mining operations with the intention of taking and appropriating the gas, oil, and minerals belonging to complainants to his or their own use and prayed for an injunction restraining them from doing so. Defendant McConnell alone answered the bill. He denied complainants' possession, alleged imperfections in their title, and justified his possession and right to mine the lands under his lease from McCready. The final decree confirmed complainants in their title and ordered as follows:

Digitized by Google

"That said defendants and each of them and all persons claiming, by, through or under them or either of them, be, and they are hereby, permanently restrained and enjoined from setting up or asserting any right, title, claim, or interest in or to the oil and gas in and upon said land, as against the rights of said complainants therein, under and by virtue of their said lease, or from interfering in any way with the complainants, their heirs or assigns, in the operation of said land under their said lease."

Many objections are made to the decree, but, as one is decisive, we do not deem it essential to consider any other.

Defendant, according to the terms of his lease from McCready, owed to her constantly accruing royalties, rights, and privileges. His lease from her obligated him for a certain period of 15 years and as much longer as gas or oil should be produced in paying quantities, to deliver to her one-sixth of all the oil as and when produced in kind, to pay her $200 per year for each gas well sunk by him as long as gas should be sold therefrom, and to furnish gas for a family occupying the residence on the premises. The value of her royalties, rights, and privileges according to the terms of the lease depended upon successful mining operations to be conducted by the lessee. Anything that would interfere with or prevent his production of oil or gas on the leased premises necessarily affected, reduced, or extinguished her royalties in kind or cash and other privileges which depended upon such production.

The bill was solely for injunctive relief to restrain McConnell, the lessee, from drilling, boring, or conducting mining operations on the premises for the production of oil or gas. The decree, after finding that complainants are entitled to the relief prayed for, proceeds to confirm them in their exclusive right and title under their lease to conduct mining operations on the premises and permanently enjoined and restrained McConnell from asserting any right, title, claim, or interest thereon, or from in any manner interfering with complainants in the exercise of the exclusive right so confirmed in them. Nothing could more effectually extinguish Abba Clair McCready's rights secured by the lease than such a decree. Obedience to its command by McConnell necessarily put a stop to her royalties in kind, and in money and the enjoyment of the other privileges secured to her by her lease and contract with McConnell. She was not made a party to the suit, and her contract was stricken down without any opportunity to be heard in defense of her rights under it. This is contrary to natural right and well-established principles of equity jurisprudence.

In the leading case of Shields v. Barrow, 17 How. (U. S.) 130, 141, 15 L. Ed. 158, the Supreme Court, after expounding the meaning of the forty-seventh rule in equity and the provisions of the act of February 28, 1839 (5 Stat. 321), which makes provision, when some defendant may not be an inhabitant of or found within a district or may not voluntarily appear to an action, for entertaining jurisdiction and rendering a decree binding upon the parties before the court, but without prejudice to others not brought into the case, observes as follows:

"It remains true, notwithstanding the act of Congress and the forty-seventh rule, that a Circuit Court can make no decree affecting the rights of an

Digitized by Google

absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court, in Elmendorf v. Taylor, 10 Wheat. (U. S.) 167, 6 L. Ed. 289: 'If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach—as if such party be a resident of another state—ought not to prevent a decree upon its merits.' But, if the case cannot be thus completely decided, the court should make no decree."

The doctrine of that case has been repeatedly affirmed and applied by the Supreme Court to cases in which the fact appeared that no final decision could be made between the parties to the suit and those represented by them without affecting the rights of absent unrepresented parties. For the latest expressions of the rule reference is made to Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 611, 13 Sup. Ct. 691, 37 L. Ed. 577; California v. Southern Pacific, 157 U. S. 229, 249, 15 Sup. Ct. 591, 39 L. Ed. 683; Minnesota v. Northern Securities Co., 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. Ed. 499; Sioux City Terminal R. & W. Co. v. Trust Co. of N. A., 27 C. C. A. 73, 82 Fed. 124, 126.

In the case now before us the complainants' right to the injunctive relief prayed for necessarily depends upon the validity of the McCready lease. The question of its validity lies at the foundation of their right of action. If it is valid, the complainants are entitled to no relief. If invalid, the complainants may be entitled to some relief. She is, therefore, within the rule referred to, an indispensable party to complainant's action. Her rights are materially affected by the decree made or by any decree that can be made in the case; and it cannot proceed without her. She is in the same plight in which the New Albany & Salem Company, in the case of Northern Indiana R. Co. v. Michigan Central R. Co., 15 How. (U. S.) 232, 14 L. Ed. 674, was found. As it was impossible to decide the controversy in that case without deeply affecting the New Albany Company, the bill was dismissed. Our attention is called to the principles discussed in Osborn v. United States Bank, 9 Wheat. (U. S.) 738, 842, 6 L. Ed. 204, and Vetterlein v. Barnes, 124 U. S. 169, 172, 8 Sup. Ct. 441, 31 L. Ed. 400, but it is thought those cases involve such a different relationship between the parties to the case and those not made parties as in the light of the authorities already cited renders them inapplicable to the present case.

No objection appears to have been made below to the court's proceeding to a decree in the absence of Abba Clair McCready; but that is unimportant. The case is now here on appeal for a hearing de novo, and we cannot avoid considering the question whether the parties are sufficient to warrant a decree granting any relief. Hoe v. Wilson, 9 Wall. (U. S.) 501, 19 L. Ed. 762.

As it is possible that the defect of parties can be cured, we will not dismiss the bill, but reverse the decree as rendered and remand the cause to the Circuit Court with directions to dismiss it unless by some appropriate procedure, within a time to be fixed, indispensable parties are brought into the case. It is so ordered.

Digitized by Google

(153 Fed. 551.)

CHITWOOD v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1907.)

No. 2,455.

1. CRIMINAL LAW—EVIDENCE—CORROBORATIVE FACTS.

On the trial of a defendant charged, under Rev. St. § 5467 [U. S. Comp. St. 1901, p. 3691], as a post-office clerk with having secreted and embezzled letters containing articles of value, and stealing such articles from letters, the government produced witnesses who testified that they saw defendant open a letter and take therefrom an article of value, which he placed in a pigeonhole. Defendant in his own behalf testified that the letter referred to was open when received, and that the article which he placed in the pigeonhole he found lying loose on his table when assorting mail, and laid it away for proper disposition. *Held*, that he was entitled to show by other employés that the mails at the office had been very heavy for some time prior to this occurrence, and that many letters and packages came in bad condition, with the edges worn and broken, so that articles could readily fall out, as evidence tending to support his defense; its weight being for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 802, 1713.]

2. SAME—EVIDENCE OF INTENT—COMMISSION OF OTHER SIMILAR OFFENSES.

On the trial of a post-office clerk charged with secreting and embezzling letters containing articles of value and stealing the contents, the government was entitled to prove a statement made by defendant a short time previously that he had destroyed a number of election circulars, a quantity of which had come into the office for distribution, as evidence tending to show the commission of an offense of similar character to those charged and bearing on the question of intent. Sanborn, Circuit Judge, dissenting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 830.]

In Error to the District Court of the United States for the Eastern District of Arkansas.

Geo. W. Murphy (Charles T. Coleman and W. M. Lewis, on the brief), for plaintiff in error.

William G. Whipple, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. Defendant Chitwood, a clerk in the post office at Hot Springs, Ark., was indicted under section 5467 of the Revised Statutes [U. S. Comp. St. 1901, p. 3691] in seven counts: (1) For secreting and embezzling a letter containing a watch fob; (2) for stealing and taking the watch fob out of a letter; (3) for stealing and taking a $10 bill out of a letter; (4) for stealing and taking a $5 bill out of a letter; (5) for stealing and taking another $5 bill out of a letter; (6) for secreting and embezzling a letter containing a post-office money order; (7) for secreting and embezzling a package containing a lady's belt. He was tried and found guilty on the first count and not guilty on the others. He now prosecutes this writ of error to secure a reversal of the judgment.

There was evidence on the part of the government tending to show that while he was engaged in discharging his duties as clerk in the

Digitized by Google

evening of March 9, 1906, a letter came into his possession as such clerk to be forwarded and delivered to one Abe Levy, to whom it was addressed; that Chitwood cut it open, took a watch fob from it, threw the envelope down and took the fob and placed it in an empty pigeonhole. The inspectors, who were watching at a distance, observing the foregoing facts, arrested him before he left the post-office building. The defendant taking the stand in his own behalf contradicted the evidence of the inspectors, and testified that he found the fob loose on his table while he was assorting mail; that he picked it up and put it in a pigeonhole, intending, if he did not find the package from which it came, to turn it over in the morning to the proper clerk for disposition; that the letter addressed to Levy was open when it came into the post office, and that the defendant did not open it. In support of his testimony to the effect just stated, defendant called three witnesses, clerks and former clerks in the Hot Springs post office, and asked them, in substance, if it had not been, for two months prior to the night in question, a common and usual thing for letters and packages to be received at that post office in bad condition, with edges so broken and worn out that trinkets or other enclosures might fall out; and he offered to show that for those two months the incoming mails had been heavy and that letters and small packages had been frequently found unsealed, torn, and broken open, as circumstances tending to support his theory of the facts and his innocence. The questions so asked and the offers to prove so made were objected to by the government, the objections sustained by the court, to which the defendant duly excepted.

We think it was error to exclude that evidence. The defendant was standing on his plea of not guilty, and the burden was on the government to establish his guilt. It produced witnesses who testified directly to seeing the defendant do things consistent only with guilt. The value of their testimony depended upon the accuracy of their observations, the reliability of their memory in describing what they saw, and the credibility due them as witnesses. Defendant denied doing what they swore they had seen him do. A sharp and vital issue was thus presented for the consideration of the jury. We think, if it were true that immediately preceding and up to the time in question it had been and was a common practice in that post office for mail to come into the office in bad condition and with ends and edges so broken or worn out that solid substances might readily fall from them, such fact would be a circumstance tending to support defendant's theory. Its value might not be great as against the other direct and positive testimony with which the trial court compared it and on account of which rejected it; but that was for the jury, and not for the court, to decide. The defendant had an undoubted right to buttress his own testimony by any and all circumstances and facts fairly tending to support it, and we think the facts offered to be proved by him were admissible for that purpose. For the error in excluding that evidence, the judgment must be reversed.

As one of defendant's contentions has been earnestly debated before us and probably will be the occasion of controversy at the next trial, we deem it proper to express our opinion concerning it. Witness Reaves

Digitized by Google

was permitted to testify for the government, over defendant's objection and exception, that defendant shortly before he was arrested told him that he had recently burned up and destroyed a lot of circulars that came into the post office from Little Rock. We think there was no error in admitting that evidence. The crimes charged in the various counts of the indictment against the defendant involved the existence of an unlawful and criminal intention, a well-known element of the crimes of embezzlement and larceny. Section 5467 makes the destruction of a letter or packet by a post-office employé as much of an offense as its embezzlement. Section 5471 makes the destruction of any mail or package of newspapers as much an offense as an embezzlement of the same. Reference is made to these sections of the statutes to show that destruction of the mail is classified with its embezzlement or larceny, not only as a kindred offense, but as one of the same rank and one subjecting the offenders to the same punishment.

Moreover, the several counts of the indictment under consideration at the time the evidence in question was offered, charging the defendant with secreting letters and packages of mail, charged an offense kindred to that of destroying mail. It is familiar law that in cases both civil and criminal where the intent of a party is in issue evidence of other acts and doings of that party at or about the time in question of a kindred character is admissible to demonstrate the motive and intent which actuated him in doing the act or thing charged against him in the case. Exchange Bank v. Moss (C. C. A.) 149 Fed. 340;[1] Wood v. United States, 16 Pet. 342, 360, 10 L. Ed. 987; Coffin v. United States, 162 U. S. 664, 672, 16 Sup. Ct. 943, 40 L. Ed. 1109, and cases cited. In an honest and legitimate investigation of that intent a reasonably wide latitude should be indulged by the trial judge, and his discretion, when fairly and unprejudicially exercised, should not be interfered with by appellate courts. Moore v. United States, 150 U. S. 57, 61, 14 Sup. Ct. 26, 37 L. Ed. 996; Dow v. United States, 27 C. C. A. 140, 82 Fed. 904, 909. The destruction of the circulars, if done by the defendant, was in the legal sense a conversion of them by him. The secreting or stealing of mail, if done by him, was likewise a conversion of it. The acts are not only kindred in their nature, but very obviously may spring from a like motive and intent. The evidence in question was properly admitted, not as evidence of a distinct offense in itself, but as bearing on the disposition and intention of the defendant in doing whatever he did do.

Other errors are assigned by defendant, but those already considered are the ones chiefly relied upon by his counsel for a reversal of the judgment. As the case must be remanded for another trial, we deem it unnecessary at the present time to express our opinion upon any other questions. We may properly assume that with the foregoing directions it will be correctly tried.

The judgment must be reversed for the error in excluding the evidence referred to in the fore part of this opinion, and it is so ordered.

SANBORN, Circuit Judge (concurring). I concur in the result in this case, but am of the opinion that it was error to receive in evidence the testimony relative to the burning of the election circulars

[1] 79 C. C. A. 278.

Digitized by Google

by the defendant. The reason for the rule that the commission by the defendant of other offenses of like character to that upon trial is admissible is that it has a tendency to prove the intent to commit the latter. If the former offenses are not like the latter, their commission has no such tendency. The commission of the offense of arson would not tend to prove an intent to commit murder. The offense charged was the secretion and embezzlement by the defendant of an article of the alleged value of $2.25 under section 5467, Rev. St., and the penalty was imprisonment at hard labor for not less than one year nor more than five years. While the destruction of such an article of value is also denounced by this section under the same penalty, the secretion, embezzlement, or destruction of circulars, papers, or letters which contain no article of value of the nature specifically described in this section is not punishable thereunder, and the destruction of circulars is not punishable under section 5471. That section denounces the destruction of newspapers only, and the penalty is imprisonment at hard labor for no more than three months.

The criminal intent requisite to the commission of the offense in this case was the intent of the defendant to secrete and convert to his own use a valuable article, the intent to secure pecuniary benefit to himself. The evidence challenged was that the defendant after working his time was unable to handle all the election circulars sent through the mail, and he burned some of them. If this be an offense, it is not denounced by either of the sections of the statutes mentioned, and it is not of a like nature or character to that of secretly taking and appropriating the property of another to one's own use. Its commission neither requires nor evidences any intent to steal or to convert to one's use anything of value or to derive any pecuniary benefit from the act. It evidences nothing but the purpose to avoid performing a duty assigned. As the reason of the rule which permits proof of similar offenses fails here, it seems to me that the rule is inapplicable.

(153 Fed. 554.)

HUBBARD v. COOK et al.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1907.)

No. 1,364.

1. LANDLORD AND TENANT—LEASE—RIGHT TO CANCELLATION.

   A lessor of property by a lease which was recorded and assignable without his consent is not entitled to a cancellation of such lease as against an assignee in good faith because of any transactions between the original parties of which the assignee had no knowledge or notice.

2. PRINCIPAL AND AGENT—SUIT BY PRINCIPAL FOR FRAUD—SUFFICIENCY OF EVIDENCE.

   Evidence considered, and *held* insufficient to entitle a complainant to an accounting from his agents on the ground of their having fraudulently induced him to lease property for less than its fair rental value.

Appeal from the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

The appellant, a resident of the state of Ohio, engaged in loaning money and renting real estate, was the owner of a certain building in the city of Spo-

Digitized by Google

kane. The property was in charge of the firm of Cook & Clarke, real estate agents at Spokane. In 1901 and 1902 it was in the possession of one Camia, an Italian, under a lease which was to expire January 1, 1904; the rental being $150 per month. Camia was running a questionable resort, and was having trouble with the police. The facts in regard to the tenant and the condition of affairs were, in a series of letters, detailed by Cook & Clarke to the appellant. In the fall of 1902 Cook & Clarke recommended the execution of a lease with the appellee Rogers for a term of five years to begin January 1, 1904, at the monthly rental of $150, the tenant to make all repairs. One of the purposes of executing this lease was to get rid of Camia and to put a third party in a position to buy him out. In November, 1902, the appellee Wilson, knowing nothing of the Rogers lease, bought out Camia's stock of goods and his lease, and went into possession. In the spring or summer of 1903 he learned of the existence of the Rogers lease, saw Rogers personally, and undertook to buy the lease. Rogers demanded $1,500 which Wilson deemed exorbitant. Afterwards, through the intervention of Clarke, Rogers assigned the lease to Wilson for $750. Rogers paid Cook & Clarke $100 for this service, but Wilson paid them nothing. The appellant brought the present suit against Cook & Clarke, Rogers, and Wilson to cancel the lease. On February 6, 1906, he filed his second amended bill of complaint, in which he alleged that at the time of the execution of the Rogers lease the monthly rental value of the property was $350; that Cook & Clarke fraudulently represented to him that the rental value was not to exceed $150 per month, and advised him to execute the lease in question; that he relied upon such advice; that there was a secret and fraudulent understanding between Cook & Clarke and Wilson to share the difference between $350 per month and the $150 per month stipulated in the lease. Upon the evidence in the case the court found the equities with the appellees, and decreed the dismissal of the bill.

William T. Stoll, for appellant.

F. T. Post and Post, Avery & Higgins, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

On the trial of the case the overwhelming weight of the testimony was that the rental value of the property at the time of the execution of the Rogers lease was no more than the sum of $150, and the trial court so found. The cancellation of the lease could only be sustained on proof that Wilson was a party to fraud in its procurement. There is no evidence of such fraud in the record. The lease which he purchased from Rogers was a valid instrument of record. It was assignable without the consent of the lessor. Aside from the knowledge that such a lease had been executed, there is no evidence that Wilson had any knowledge or notice of any previous transactions between Hubbard and Rogers or between any of the other parties to the suit. So far as the record shows to the contrary, Wilson was an innnocent purchaser for value. These considerations are sufficient, so far as Wilson is concerned, to sustain the decree of the court below upon the issues which were presented upon the pleadings.

But the appellant earnestly insists that there is proof of fraud on the part of Cook & Clarke which renders them liable in equity to account to the appellant, in the fact that on October 14, 1903, Cook & Clarke wrote the appellant to the effect that Rogers was reluctant to proceed with the lease and was not eager for possession, and they were trying to get him to assign his lease to Wilson, and said: "This might be

Digitized by Google

better than to force Rogers to fulfill his contract if he thinks it no longer for his interest to take possession," and that this was written after the date when they had received a responsible offer from one Atwood of $225 per month, which offer they not only declined to accept, but did not even report to the appellant. Of course this alleged fraud cannot be availed of to cancel a lease theretofore lawfully executed to Rogers and subsequently assigned to Wilson, who had nothing to do, so far as the record shows, with the conduct of Cook & Clarke, and had no knowledge of what they were doing. Nor do we see that the proofs justify the charge that Cook & Clarke acted fraudulently in the matter. There is nothing to show that it was to their advantage to let the premises to Wilson rather than to Atwood. The offer of Atwood was made about a year after the Rogers lease had been executed and placed of record. The Rogers lease was assigned to Wilson on November 17, 1903. The date of Atwood's offer does not clearly appear. Atwood testified that it was in the summer or fall of 1903 or early in the following winter. Taking the statement which is most favorable to the appellant, that of Clarke, that it was made some two or three months before the assignment of the Rogers lease to Wilson, the question arises: What was the duty of Cook & Clarke with reference to that offer? At that time the Rogers lease was outstanding, and it was not known that Rogers would transfer it or agree to its cancellation. Atwood's offer was for a term of three years and contained no offer to make repairs. There is nothing to indicate that he would have been willing to pay Rogers any sum for the transfer of the lease. Wilson, on the other hand, had an inducement to pay Rogers the sum of $750 in the fact that he had bought out the stock, goods, and fixtures of Camia, having paid him therefor, and for the lease and the good will of the business $2,000. His payment to Rogers was equivalent to an addition of $12.50 per month to the monthly rental of the lease. It may be that Cook & Clarke were remiss in their duty in not notifying the appellant of Atwood's offer and giving him the opportunity, if he saw fit to avail himself of it, of making overtures to buy the Rogers lease. But their error, if error they made, is not shown to have been more than an error of judgment nor such a dereliction of duty as should charge them in equity with the payment of money to compensate the appellant for the additional rent which might or might not have resulted from a possible lease to Atwood. It is true that since the execution of the lease rental values have greatly increased, owing to the rapid growth and prosperity of the city of Spokane, and, in the light of subsequent events, it now appears that it would have been better not to have executed the Rogers lease. But it does not follow that it was bad judgment to execute it at the time when it was made. The appellant could judge of the advisability of making the lease as well as could the agents. As the court below said: "It was as much his duty to peer into the future as it was that of his agents." In brief, we find in the record no ground whatever to set aside the lease and no reason sufficient in equity to require Cook & Clarke to account for the difference between the $150 a month stipulated for in the Rogers lease, which also bound the lessee to make all repairs at his own expense, and the $225 per month which Atwood offered to pay, without

Digitized by Google

assuming the burden of repairs. And especially is this so when we consider that the appellant was powerless to accept the Atwood offer when it was made, even if it had been communicated to him, and that there is no proof whatever that the agents ever received directly or indirectly, any benefit from any of the transactions save and except the sum of $100 paid by Rogers for their services in selling his lease to Wilson.

The decree of the Circuit Court dismissing the bill is affirmed.

(153 Fed. 557.)

FREDERICK LEYLAND & CO., Limited, v. HOLMES.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1907.)

No. 1,590.

1. SHIPPING—INJURY TO STEVEDORE—DUTY OF VESSEL.

The owners of a vessel owe a personal duty to the members of a stevedore's gang employed to work thereon to provide reasonable security against danger to life or limb, and to warn them of any latent danger caused by the ship, or for which the ship is responsible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 349, 350.]

2. SAME—LIABILITY OF VESSEL—DEFECTIVE HATCH COVER.

In a suit by a stevedore's employé to recover from a vessel for a personal injury caused by the falling of a hatch cover, precipitating him into the hold, it was shown that, when in the course of his duty he went to remove the cover which had been closed by the vessel, or by those for whom she was responsible, he was not warned of any danger; that he went upon the hatch, when, without fault or negligence on his part or on the part of his fellow laborers, the supports immediately collapsed without apparent cause. *Held*, that such evidence was sufficient to make a prima facie case, which, unless overcome by countervailing evidence, entitled him to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 349, 350.]

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Wm. C. Dufour and H. Generes Dufour, for appellant.

John D. Grace, for appellee.

Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The learned judge who sat in the court below placed on record a memorandum of his reasons for refusing a new trial, which we here quote in full:

"PARLANGE, District Judge. I shall state briefly my reasons for refusing a new trial.

"The first specification of the motion for a new trial is an assertion that the court shifted the burden of proof from the libelant to the claimant and thereby committed error. That specification is entirely without foundation. When stating orally my reasons for decreeing in favor of libelant, I said that he had, in my opinion, fully met the burden of proving affirmatively the vessel's negligence and his own damages. Libelant clearly and distinctly proved by the testimony of several eyewitnesses the circumstances and the cause of

Digitized by Google

the accident. Unless there is reason for disbelieving these witnesses, or unless their evidence is outweighed by countervailing proof, it is plain that the case is with the libelant. These witnesses were not impeached. They stood well the test of cross-examination. Their testimony was not inconsistent with probability, and showed no inherent weakness. If it was said that it must be assumed, entirely without proof, that they were so biased towards libelant as to commit perjury, because of the mere fact that they, as well as himself, were longshoremen, the reply would be that such assumed bias would be offset by the bias towards the ship which the claimant's two witnesses would also have to be assumed to have labored under.

"The claimant produced only two witnesses, the first and second officers. They did not see the accident. The sum and substance of their evidence is the assertion by them that the 'fore and after' was safe, and has not been repaired. They admit that the accident happened, but they make no explanation with regard to its cause. The first officer says that the hatch was closed in Liverpool by stevedores. He cannot tell whether an officer was present at Liverpool to see that the hatches were properly put on. He admits that the hatches are often opened by the crew to clean the holds out. He testifies that 'he never knew' that the burden piece was sprung on the day of the accident. I can find but little in his evidence which can be of any benefit to the vessel. The second officer admits having a very bad memory. Being asked whether any repairs have been made to the burden pieces since he has been on the ship, he replies: 'None that I know of.' On one occasion it was necessary to straighten a burden piece on one of the hatches with block and tackle; but he cannot tell when this took place, except that it must have been within three years, because he had not been three years on the vessel. There is but little in his evidence of benefit to the claimant. There are two experts in the case. Mr. Malochee and Capt. Morse, both excellent men, who, beyond all question, testified absolutely what they believed to be the truth. But when Mr. Malochee's testimony is analyzed closely, as I have done, it will be found that it is not nearly so strong in favor of the vessel as the learned counsel for the claimant has contended. Besides Mr. Malochee has admitted frankly his lack of familiarity with hatches and with matters concerning ships. This was the first occasion on which he has viewed a hatch for the purpose which was required of him in this case. On the other hand, Capt. Morse, a man of equally high standing with Mr. Malochee, and much older and of far greater experience with vessels, who was a ship carpenter by trade and a builder of wooden and iron vessels, who was for 20 years steamship superintendent for the Southern Pacific, testifies unhesitatingly, after viewing the hatch and the 'fore and after': 'It was bent so that I would not use it in that condition. I did not consider it safe.' It is clear, therefore, that the libelant has proven his case by a large preponderance of evidence.

"While, as I have already said, I did not, when deciding the case orally, say that the accident had shifted the onus of the proof of negligence to the claimant, I did say incidentally that, besides the affirmative proof made by libelant, the cause was clearly one in which the doctrine of 'res ipsa loquitur' applies with full force. And I do not see how there can be any doubt on that point. It is doubtless true—in fact, it is familiar and elementary law—that, as a general rule, negligence will not be presumed from the mere happening of an accident. I have very often had occasion to apply the rule in master and servant cases, in which cases there are special reasons—which need not now be gone into—for the application. But there is an exception to the rule which is as familiar as the rule itself.

"The A. & E. Enc. Law (2d Ed.) verbo Negligence, vol. 21, p. 513, after stating the general rule, says: '* * * It is proper, however, to state in a general way that wherever injuries occur in the conduct of operations which common experience has shown can be safely carried on with the exercise of reasonable vigilance, judgment, and care, the mere happening of injuries will be regarded as sufficient to warrant the submission of the question of negligence to the jury'—numerous cases cited. Judge Brown, in Warn v. Davis Oil Co. (D. C.) 61 Fed. 632, said: 'This ruling is based upon the principle of

Digitized by Google

wide application in the law of torts, that injuries which do not ordinarily happen when reasonable and proper care is taken to avoid them, afford a presumption of negligence,' etc. See Mr. Justice Lamar, in Tolsen Case, 139 U. S. 555, 11 Sup. Ct. 653, 35 L. Ed. 270. See Judge Morrow, in The Joseph B. Thomas (D. C.) 81 Fed. 578, and especially the same case affirmed in the Circuit Court of Appeals (86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58), and the cases and authorities there cited.

"I deem it needless to cite other authorities on such a point. The burden of proof never shifts, either in a civil or a criminal case, notwithstanding loose language which may be found in the books. But when a prima facie case is made, judgment will then be rendered against the opposite party, unless he goes forward with countervailing proof which overcomes the adversary's prima facie case. This is what is sometimes erroneously termed the shifting of the burden of proof. Therefore the court did not, and could not, under its very distinct views of the question of law involved, have said that the accident shifted the burden of proof of negligence to the claimant. But it is certain that there is absolutely no proof that the libelant was in any way negligent. It is equally certain that a vessel is bound to have her hatches in such condition that her stevedores, invited by her to come on board, can open the hatches without danger to life or limb, provided they use reasonable care and prudence. It is also well settled that a vessel is bound to give notice to the stevedores of a latent danger caused by the ship or for which the ship is responsible. 'The owners of a vessel owe a personal duty to the members of the stevedore's gang to provide reasonable security against danger to life or limb.' Judge Morrow, in The Joseph B. Thomas, affirmed by the Circuit Court of Appeals, cited supra. And it is also very certain that, when it is shown that a stevedore is called by the vessel to open her hatches, which were closed by her, or by persons for whom she is responsible, and that the stevedore is not notified of any latent danger, and he goes on the hatch and undertakes to open it, using reasonable care and prudence, and immediately, and without any fault or negligence on his part or on the part of his fellow laborers, the supports of the hatches collapse without apparent cause, and the stevedore is precipitated into the hold, and he is severely injured, he will be held to have made out at least a prima facie case entitling him to recover, unless the opposite side then goes forward with the evidence and overcomes the stevedore's prima facie case.

"The damages awarded are moderate, in view of the evidence. No attempt was made to contradict the testimony of the libelant's doctor or the libelant's own testimony on the question of his injuries. No medical examination of the libelant's person was sought by the claimant. I do not see how the claimant, if it conceded arguendo its liability, could, under the evidence, reasonably contest the amount awarded as damages."

We have heard with interest the able oral argument of the proctor for the appellant, and carefully read his printed brief, and have fully examined all of the testimony set out in the transcript of the record, and find no reason therein for reversing or qualifying the action taken or the views expressed by the learned district judge as above shown, in this case.

Therefore the decree appealed from is affirmed.

Digitized by Google

(153 Fed. 560.)

WESTERN REAL ESTATE TRUSTEES et al. v. HUGHES.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1907.)

No. 2,425.

TRIAL—EXCLUSION OF EVIDENCE—INSTRUCTIONS.

In an action for damages caused by the collapse of a building during alteration, plaintiff alleged noncompliance with an ordinance requiring the issuance of a building permit before the building alterations were commenced. Defendant sought to prove what had been done with reference to securing a permit before the commencement of the work, but the court sustained plaintiff's objection, and stated that he did not see how the permit was material; that in the view he took of the case it would go to the jury on the single proposition whether the work was done in a negligent manner. The matter was not again referred to, but the court charged that in determining whether defendants were negligent the jury might consider the fact that the city ordinances required a permit to be obtained, the fact that one was not obtained, and whether the omission contributed to the injury. *Held*, that such instruction submitted an issue on which defendant had not been heard, and was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 596.]

In Error to the Circuit Court of the United States for the District of Nebraska.

Writ of error to review a judgment obtained by Hughes in an action against the Western Real Estate Trustees and others.

Wm. Baird (John C. Wharton, on the brief), for plaintiffs in error.
Irving F. Baxter (Hall & Stout, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The plaintiff, a merchant of Omaha, Neb., sued for damage to his stock of merchandise and trade fixtures and furniture resulting from the collapse of a building which he occupied as a tenant. The defendants owned the adjoining property. Between the buildings was a party wall which had been erected some years before under a contract made by the former owners. The defendants were having alterations made in their building, and during the progress of the work the party wall fell, dragging with it portions of the two buildings and causing the damage complained of. The charge in the petition is that the work was being negligently done, and also unlawfully, because no building or alteration permit had been secured from the building inspector as required by a municipal ordinance. The sections of the ordinance which were set forth prohibited the alteration of any building before a permit had been obtained and until the building had been examined and approved by the inspector as being in safe condition to be altered. At the trial the plaintiff introduced evidence tending to show negligence, showing the adoption of the ordinance by the municipal authorities, and also the fact that no permit for the work had been procured. When the evidence for the defense was being introduced the agent in charge for the defendants was asked while testifying what, if anything, had been done with reference to securing a permit before the commencement of the work. The trial court sustained plaintiff's objection to the question, and the defendants excepted. The question

Digitized by Google

was reframed and asked again, and upon a repetition of the objection the trial court said:

"I cannot see how the permit cuts any figure in this case. I will listen to each of you on that branch of the case; but, as I view the case now, it will go to the jury on the single proposition as to whether or not this work was done in a negligent and unskillful manner, leaving out of consideration the question which may arise, if any, as to party wall business. At present we will exclude it. If I am convinced before the case ends that the permit cuts any figure in this case, you will be permitted to go into that branch."

The defendants, conforming to the decision of the court, then desisted from this line of inquiry, and the matter was not again referred to until the court, in charging the jury, said that they might in determining whether the defendants were negligent consider in connection with all the evidence the fact that the ordinance required a permit to be obtained, the fact that one was not obtained, and the question whether the omission contributed to the injury. This was doubtless an inadvertence on the part of the court, but the prejudicial effect upon the defendants may well be inferred in view of the sharp conflict in the other evidence upon the issue of negligence. The ruling of the court was not merely upon the particular question asked, but it was comprehensive in scope and clearly decisive of one of the substantial features of the case. It was in favor of the defendants, and, of course, they were not required to except to it. The language of the court invited the obedience of counsel and contained a promise of warning in case of a change of its view. For the time being the question of permit or no permit was no longer in the case; for, when the court made the ruling, the case stood, so far as the defendants were concerned, as though the averments about the ordinance and permit had been stricken from the petition. They were entitled to be seasonably advised of a change in the opinion of the court so that any defense they had might be presented and be in judgment. They have not had their day in court upon that matter, and we need not speculate as to what might possibly excuse an omission to obtain a permit, or whether the ordinance in its relation to the question of negligence would be satisfied if the building inspector in point of fact inspected the building and orally authorized the alterations.

Harkison v. Harkison, 41 C. C. A. 201, 101 Fed. 71, presented a question quite similar. It was an action for fraud and willful deceit, in which under a local statute a judgment for the plaintiff entitled him to execution against the body of defendant. At the close of plaintiff's evidence the defendant moved for a nonsuit, upon the ground that the cause of action was barred by the statute of limitations, and the court in overruling the motion held that the action was in assumpsit, and not for fraud and deceit. Thereafter the defendant in making his defense did not touch upon the tortious aspect of the case as averred in the complaint, but when the court charged the jury it submitted the question of fraud and willful deceit to them, they found the defendant guilty, and a judgment of imprisonment followed. This court held that the defendant had been prejudiced in making his defense and awarded a new trial. An analogy may also be found in Michigan Insurance Bank v. Eldred, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162,

Digitized by Google

in which a plaintiff was induced by the court's announcement of its view upon one of two defenses to refrain from introducing evidence to meet the other.

The other assignments of error do not require mention. We have examined them and found them untenable.

The judgment is reversed, and the cause is remanded for a new trial.

(153 Fed. 562.)

JOSEPH WILD & CO. v. PROVIDENT LIFE & TRUST CO.

(Circuit Court of Appeals, Third Circuit. April 30, 1907.)

No. 26.

BANKRUPTCY—PREFERENCES—PAYMENTS ON RUNNING ACCOUNT.

It is only where new sales succeed payments, and the net result is to increase the value of the estate, that payments made by an insolvent debtor on a running account are not to be considered as preferential transfers, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], which must be surrendered, under section 57g, before the creditor can prove the remainder of his claim.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 146 Fed. 142.

Max L. Powell, for appellant.

A. G. Dickson, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from a decision of the District Court for the Eastern District of Pennsylvania, in bankruptcy. The appellant sold merchandise to the alleged bankrupts and received payments on account, as set forth in the following statement:

1901.			Terms.		1901.		
Feb.	14	To Mdse.	4 Mos..	$ 176 58	June 29	By Cash.....	$ 176 58
June	5		" ..	175 38	Oct. 10	" "	634 78
							$ 811 36
	7		" ..	173 64		Balance.....	$2,565 92
	15		" ..	122 30			
	28		" ..	59 66			
	29		" ..	103 80			
					$811 36		
July	19		" ..	220 00			
	23		" ..	10 00			
	26		" ..	535 32			
Aug.	14		" ..	364 02			
	24		" ..	180 60			
Sept.	6		" ..	175 08			
	11		" ..	176 04			
	30		" ..	178 20			
	26		" ..	177 78			
Oct.	8		" ..	183 30			
	8		" ..	182 88			
	12		" ..	182 70			
				$3,377 28			$3,377 28
1902.							
Jan.	1	To balance		$2,565 92			

Digitized by Google

For this balance, claim was made against the trustee, and the same was duly referred to the referee, before whom testimony was taken and by whom the claim was afterwards allowed. The trustee then filed a petition, asking for a re-examination, which was allowed by the referee, and from his report again allowing the claim, we take the following findings:

"The trustee has filed a petition asking for a re-examination of the claim, averring that since the last of the above transactions, the claimant received from the bankrupts a payment of $634.78, which, it is contended, should be surrendered as a preference. The petition was allowed and testimony taken; from the testimony taken, supplemented by an agreement between the parties, I find the facts to be as follows: The bankrupts became insolvent on or before January 1, 1901; the claimants had no knowledge of their insolvency, and the sales and payments hereinafter referred to, were made in the usual course of business. The claimants, on various days in the month of June, 1901, shipped certain goods to the bankrupts sold on open account on four months' credit, and on October 10, 1901, the bankrupts paid the claimants for the above goods, $634.78. At various dates between July 19, and October 8, 1901, inclusive, the claimants shipped certain other goods sold by them to the bankrupts on open account on four months' credit. The total amount due on the above sales is $2,565.92. It is for the money due on the shipments last referred to, that the claim now under consideration was filed."

The referee, after an interesting discussion of the authorities, felt constrained to follow what he conceived to be the reasoning of Judge Putnam, in delivering the judgment of the Circuit Court of Appeals, in Dickson et al. v. Wyman, 49 C. C. A. 574, 111 Fed. 726. In that case, section 57g of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444]) was so construed as not to require a creditor to surrender partial payments received by him on account, in the usual course of business, where the transactions covered by the account between them, taken together, resulted in increasing the net indebtedness to the creditor and correspondingly increasing the bankrupt's estate. This and the case of Jaquith v. Alden, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717, lends some support to the conclusion arrived at by the learned referee. Upon the petition of the trustee, the question was certified by the referee to the district court for review, and the order of the referee, directing the trustee to pay the claimant a dividend on $2,565.92, without surrendering the said preferential payment of $634.78, was reversed.

There is much in the natural equity of the situation that commends the contention, that, where there is an open and running account after the insolvency, in which the various transactions of delivery of goods and partial payments took place openly and honestly, both sides of the account should be considered, and if the net result is an enrichment of the bankrupt's estate, partial payments, though made within four months of the filing of the petition, should not be considered as preferences, within the meaning of section 60a of the bankrupt act (30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). It may be admitted that the authorities are not harmonious and do not satisfactorily dispose of the precise question here presented, but, until the Supreme Court shall have decided otherwise, we feel constrained, by what seems to be the ratio decidendi of both Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, and Jaquith v. Alden, 189 U. S.

Digitized by Google

78, 23 Sup. Ct. 649, 47 L. Ed. 717, to say that it is only where new sales succeed payments and the net result is to increase the value of the estate, that payments on a running account are not to be considered as preferential transfers under section 60a, to be surrendered under section 57g. This general view is supported by Kimball v. Rosenham, 52 C. C. A. 33, 114 Fed. 85, and by Appeal of American Woolen Co., 57 C. C. A. 412, 121 Fed. 658. This court, also, in Gans v. Ellison, 52 C. C. A. 366, 114 Fed. 734, recognizing the hardship of treating partial payments on a running account as preferences under the act, uses this language:

"If, then, a creditor innocently preferred has given return credits afterwards, he has surrendered his preference to the extent of such return credits. To effectuate justice, both sides of the account are to be considered in the case of a creditor who innocently has received preferences and afterwards in good faith has given the debtor further credit, without security, for property which has become a part of the debtor's estate."

The rule, that further credit must be given the bankrupt after the last partial payment, seems technical and artificial, where the payment, as in this case, made October 10th, was only two days after the last sales and credit on the account between the claimant and the bankrupt. The rule, however, has been widely recognized, is based upon sound reasoning, and has been authoritatively stated by the Supreme Court. We are not, therefore, justified in creating an exception on the special circumstances of the present case.

The judgment of the court below is therefore affirmed.

NOTE.—The facts on which this action was based arose prior to Act Cong. Feb. 5, 1903, whereby sections 57g and 60b of the bankruptcy act [U. S. Comp. St. Supp. 1905, p. 689] were amended.

(153 Fed. 564.)

MARKELL v. MATTESON.

(Circuit Court of Appeals, Third Circuit. May 13, 1907.)

No. 24.

COURTS—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where, in an action for breach of a contract for the sale of a drug business brought in a federal court, there was evidence that the business and good will was of such a value that plaintiff's share thereof, together with $500 advanced by plaintiff as a part of the price for which he also sued, would amount to $2,000, an objection that the amount in controversy was not shown equal the jurisdictional amount because there was no proof of any market value of the goods inventoried or what they would sell for was unsustainable.

[Ed. Note.—Jurisdiction of circuit courts as determined by the amount in controversy, see note to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

L. C. Barton, for plaintiff in error.

J. M. Magee, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. The case below was an action of assumpsit, brought by the defendant, A. D. Matteson, individually, against S. C. Markell, to recover damages for a breach of contract entered into

Digitized by Google

between said Matteson and one H. B. Scoville, of the one part, and said Markell of the other part, for the purchase and sale of a certain drug store and business of the latter, situate in Washington County, Pennsylvania. Said Matteson and Scoville were not co-partners, but merely appear as would-be joint purchasers of the business.

There was evidence tending to show a verbal agreement between said Matteson and said Scoville, of the one part, and Markell, the plaintiff in error, of the other, by the terms of which plaintiff in error was to sell to the said Matteson and Scoville his drug store and business, situate as aforesaid, for whatever sum might appear as the value thereof, in the inventory to be thereafter made. Of this sum, $2,000 was to be paid in cash and the balance within a period of six years, there being no set times for the deferred payments. There was also evidence to show that, after the taking of the inventory, which amounted to the sum of $8,300, the plaintiff in error induced the said Matteson, the defendant in error, to give him $500 on account. The testimony tended to show that this had been no part of the oral understanding, and that the defendant in error would not have complied with plaintiff in error's request, had it not been that the plaintiff in error threatened to discontinue negotiations, unless this cash payment was made. The $500 was paid over to plaintiff in error, without the knowledge or authority of the said Scoville. There seems to have been an understanding that these terms were to be set out in a written agreement. The negotiations, however, failed to so result, and there is much conflict of testimony, as to which party was responsible for the failure.

Defendant in error instituted this suit to recover damages, alleged to amount to $4,520, including those for the non-return of the $500 and also for the loss occasioned by the alleged breach of the agreement by defendant to sell his drug store, with its contents, and his business or good will.

After a trial, a verdict and judgment were rendered for the $500, and interest on the same. To this judgment, the present writ of error has been sued out.

Objection is made that, as there was no proof of any market value of the goods inventoried, or of what the same would sell for, no basis was established by which any amount approaching the jurisdictional amount of $2,000, could be alleged as damages. There was proof, however, which tended to show that the business and good will was of such a value as that plaintiff's share thereof, taken together with the $500 advanced by him and for which he brought suit, would amount to the sum required.

Three of the assignments of error cover certain refusals of the court to charge requests by the defendant, and the remainder are to the refusal of the court to give peremptory instructions in favor of the defendant, for not sustaining defendant's motion for judgment, non obstante veredicto, and for not arresting judgment on defendant's motion.

The charge delivered by the learned trial judge was entirely fair to the defendant, and we see no reason why the conflicting evidence in this case should not have been submitted to the jury.

The judgment below is therefore affirmed.

Digitized by Google

(153 Fed. 566.)

TOWLE v. FIRST NAT. BANK OF BOSTON.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1907.)

No. 2,481.

TRIAL—FEDERAL COURTS—SPECIAL FINDINGS WHERE JURY IS WAIVED.

Special findings by a trial judge in an action at law in a federal court, where a jury has been waived pursuant to the provisions of Rev. St. § 649 [U. S. Comp. St. 1901, p. 525], have the same effect as special verdicts of a jury, and must embrace a finding on every material issue joined in the case, otherwise the result is a mistrial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 935.]

In Error to the Circuit Court of the United States for the District of Minnesota.

John F. Fitzpatrick, for plaintiff in error.

Edward E. Blodgett (Henry B. Wenzell, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was an action at law upon a contract of guaranty executed by Uri L. Lamprey in his lifetime to the Massachusetts National Bank, an assignor of plaintiff, to recover $12,000 and interest. The amended complaint set out the contract, which was, in substance, that if the bank would loan H. G. & H. W. Stevens, as they might from time to time request, amounts not exceeding at one time $30,000, he, Lamprey, would pay any note, draft, or other obligation given by the borrowers therefor not paid by them at maturity; and averred that, relying on the guaranty, the bank loaned to the Stevenses from time to time different sums of money and took their notes therefor maturing at given dates, which were not paid. The answer denied generally each and every allegation of the complaint except as therein admitted, qualified, or denied. It then admitted the execution of the guaranty as alleged and pleaded as an affirmative defense as follows:

"That it was expressly agreed by and between the Massachusetts National Bank and the defendant that said guaranty should only cover loans and advances to H. G. and H. W. Stevens as copartners or jointly, and not loans or advances to be made to either H. G. Stevens or H. W. Stevens individually or separately; and the defendant is informed and believes, and so charges, the facts to be that said Massachusetts National Bank did not make any loans or advances whatsoever to H. G. and H. W. Stevens as copartners or jointly, but did make loans and advances to H. W. Stevens, and that the commercial obligations set forth in the complaint, if they are valid obligations at all, are the obligations of H. W. Stevens only, and not obligations of H. G. Stevens, as copartner or otherwise."

The replication put the affirmative defense in issue. A jury was waived, the case tried to the court, special findings of fact made, and judgment rendered for plaintiff for $12,080, and interest. Much evidence was heard touching the relations of the parties and the circumstances under which the contract of guaranty was executed and the loans made; and the chief issue now argued before us is whether the guaranty contemplated loans made to H. G. and H. W. Stevens as co-

Digitized by Google

partners only, or whether it also covered loans made to either of them as an individual provided only he borrowed it for a concern doing business in the name of H. G. & H. W. Stevens.

That issue was clearly and definitely joined in the pleadings, and was one apparently conceded not to be determined solely by the construction to be placed upon the language of the contract of guaranty, but in part by competent proof aliunde that instrument. The instrument nowhere expressly refers to the Stevenses as copartners, and yet their joint names are referred to as together desiring to make loans of the bank. There is manifestly an ambiguity here which admits of elucidation by proof, and the parties treated the issue as one of fact to be determined by proof and much evidence of the surrounding facts, acts, and conduct of the parties was taken. On all this evidence counsel for plaintiff contend that the instrument guarantied advances made to a concern called "H. G. & H. W. Stevens" as it then existed, regardless of its personnel, and that a reasonable construction gathered from the language of the instrument, in the light of surrounding circumstances and of the cotemporaneous construction placed upon it by the parties, makes this contention clear. Counsel for defendant contend, on the other hand, that all the proof shows that the instrument was intended to guaranty the payment of loans made to the Stevenses as copartners, and not otherwise. This issue distinctly made in the pleadings and tried by the evidence should have been found by the trial court one way or the other, but was not. It was the vital issue in the case, and one which is now pressed upon us by both parties as decisive of it. But it is said that the trial court in effect made a finding on that issue as a result of its other findings; that the finding that the several loans which formed the basis of the suit were made by the bank to said H. G. & H. W. Stevens "relying upon and in consideration of said agreement and guaranty" is on the authority of Fox v. Haarstick, 156 U. S. 674, 15 Sup. Ct. 457, 39 L. Ed. 576, the equivalent of a finding against the defendant on the issue as to partnership tendered by him.

We think the findings as made cannot fairly be held to involve or imply a finding on the issue in question. Conceding that the loans were made "relying upon and in consideration of said agreement of guaranty," yet that concession does not determine what the parties meant by the ambiguous and indefinite reference to "H. G. & H. W. Stevens" found in the guaranty. In other words, the loans may have been made in reliance upon and in consideration of the guaranty, and yet may or may not have been made to H. G. and H. W. Stevens as copartners or on their joint liability.

Special findings by a trial judge in actions at law made pursuant to the provisions of Act March 3, 1865, c. 86, 13 Stat. 501, when a jury has been waived have the same effect as special verdicts of a jury. Section 649, Rev. St. 1878 [U. S. Comp. St. 1901, p. 525]; Norris v. Jackson, 9 Wall. (U. S.) 125, 19 L. Ed. 608; Miller v. Life Ins. Co., 12 Wall. (U. S.) 285, 301, 20 L. Ed. 398. The latter must embrace a finding on every material issue joined in the case. Patterson v. United States, 2 Wheat. (U. S.) 221, 4 L. Ed. 224; Barnes v. Williams, 11 Wheat. (U. S.) 416, 6 L. Ed. 508; Prentice v. Zane's Adm'r,

Digitized by Google

8 How. (U. S.) 470, 484, 12 L. Ed. 1160; Graham v. Bayne, 18 How. 60, 63, 15 L. Ed. 265; Ward v. Cochran, 150 U. S. 597, 608, 14 Sup. Ct. 230, 37 L. Ed. 1195.

When findings are not made on all the material issues, the result is a mistrial and the cause must be remanded for a new trial. Cases, supra, and Suydam v. Williamson, 20 How. (U. S.) 427, 441, 15 L. Ed. 978.

There was, in our opinion, a clear disregard of this well-settled rule in the trial of this case. No finding was made on a material and vital issue joined between the parties. Without that finding the judgment as rendered cannot be sustained. The defendant assigned for error that the judgment as rendered was not justified by the facts as found and from what has been said that assignment must be held good.

The judgment is reversed, and the cause remanded to the Circuit Court, with directions to grant a new trial.

(153 Fed. 568.)

SHERIDAN v. ALLEN et al.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1907.)

No. 2,459.

INTERNAL REVENUE—SALE OF PROPERTY UNDER DISTRAINT WARRANT—REPLEVIN BY THIRD PARTY.

A sale of property by an internal revenue officer under a distraint warrant for the collection of a tax does not cut off the title of a third person who does not owe the tax and against whose property the warrant is not directed, and the true owner may assert his title and right of possession by replevin against the purchaser after the officer has made the sale and transferred possession, and has thus completed his official acts with respect to the property. A sale of property by a collector under a distraint warrant is clearly distinguishable from a sale of property seized and condemned in forfeiture proceedings for violation of the customs or internal revenue laws, and passes only the interest of the tax debtor.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

For opinion below, see 145 Fed. 963.

Henry W. Blodgett (Walter N. Davis, on the brief), for plaintiff in error.

E. P. Johnson, Asst. U. S. Atty., for defendants in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The Commissioner of Internal Revenue made an assessment against one C. J. Knott of $900 for taxes due as a manufacturer of oleomargarine and certified it to Allen, the collector at St. Louis, Mo., for collection. The collector's demand for payment was refused, and he thereupon issued a distraint warrant and levied it upon a buggy, a wagon, and a horse as the property of Knott. The property was advertised by the collector and sold to three purchasers. Immediately after the sale, Sheridan, a constable of St. Louis, seized the property under a writ of replevin issued by a justice

Digitized by Google

of the peace in an action commenced by Madge Knott, the wife of the delinquent manufacturer. Thereupon the collector and the purchasers filed a joint petition in the Circuit Court of the United States for the Eastern District of Missouri for an order on the constable to surrender the property at once to the collector or the purchasers. The constable demurred to the petition, saying that it did not state facts sufficient to entitle the plaintiffs to relief. The trial court overruled the demurrer, the constable stood thereon and refused to plead further, and the order prayed for was made. Hence this writ of error by the constable. The question is whether the petition states a cause of action, and this involves the right of Madge Knott to maintain her replevin action, assuming her to have been the owner of the property. It is not averred in the petition of the collector and the purchasers that the constable took the property from the possession of the collector. The mere charge that he seized the property immediately after the sale will not bear that construction, and the suggestion to the contrary is negatived by the further averment that the constable withholds the property "from the possession of the parties above named to whom the same was sold by said collector." Nor was it averred that possession was being withheld from the collector. It is charged that the replevin action is illegal and in violation of the laws of the United States, etc.; but no facts are set forth from which such legal conclusions might be drawn or showing that the collector was in any manner interfered with or obstructed during the performance of his official duties and before the full completion thereof. So the case should be considered as though the collector had completed the sale, had delivered the property to the purchasers, and were now endeavoring to protect them from a claim of ownership by a third person who was not indebted to the government and whose property he had no right to seize. If the collector had no duty which remained unperformed, and no official interest which he was authorized to protect by an action of this character, the constable's demurrer should have been sustained, because the purchasers who joined with him as coplaintiffs are not entitled to proceed in this way for the assertion or defense of purely private rights. It may at once be conceded that, as long as the collector remained in possession under the distraint warrant, he could not lawfully be disturbed in the performance of his duties by a replevin action brought by any person whomsoever. The property so held is expressly declared to be in the custody of the law and irrepleviable. Rev. St. § 934 [U. S. Comp. St. 1901, p. 689]; Treat v. Staples, Holmes 1, Fed. Cas. No. 14,162. Nor could C. J. Knott, the debtor in the distraint warrant, afterwards recover the property by replevin from the purchasers upon the ground that he did not owe the tax or that there was some defect in the proceedings of the collector. Nor could any person maintain a suit to enjoin the collector from proceeding with the sale of the property for the collection of the tax. Rev. St. § 3224; Pullman v. Kinsinger, 2 Abb. (U. S.) 94, Fed. Cas. No. 11,463. But the case before us presents none of these conditions. No one interfered with the possession of the collector or obstructed him in doing his duty, and the tax debtor is not here questioning his responsibility or the title that passed

Digitized by Google

to the purchasers. The real questions which arise are whether the sale of property by a revenue officer under a distraint warrant for the collection of a tax cuts off the title of a third person who does not owe the tax and against whose property the warrant is not directed; and, if not, whether the true owner may assert his title and right of possession by replevin against the purchasers after the officer has made the sale. It is elementary that property does not always remain in the custody of the law merely because it was once in the possession and subject to the jurisdiction of a court or public officer. When jurisdiction has been exhausted and possession relinquished, it is as much the subject of seizure at the instance of any one not concluded by the prior proceedings as other property.

The proceedings of a collector for the collection of a tax, such as were taken in this case, are distinguishable from a forfeiture and condemnation of property seized for violation of the customs or internal revenue laws. In a case of the latter character the proceeding is in rem. The offense which has been committed is attached to the property itself. In a sense the property is proceeded against as the offender. When a forfeiture of personal property arising from illegal act or omission has been made effective by condemnation and sale, all title passes to the purchaser, and in some instances without reference to any personal delinquency of the owner. The owner may or may not be innocent; the property may or may not belong to him who is guilty. But not so in a case like that before us. There was no proceeding for forfeiture and condemnation for any delinquency of C. J. Knott. He simply failed to pay a tax assessed against him and a writ in the nature of an execution was issued for its collection. In such cases the acts of Congress limit the lien of the government to the property belonging to the tax debtor, and it is only such property that the collector is authorized to levy upon and sell. Moreover, it is expressly provided that the collector's certificate of sale "shall transfer to the purchaser all right, title and interest of such delinquent in and to the property sold." Rev. St. §§ 3188, 3190, 3194, 3186, as amended by Act March 1, 1879, c. 125, § 1, 20 Stat. 327 [U. S. Comp. St. 1901, p. 2060]. Naturally the purchaser gets no more than the collector is authorized to seize and sell, and we know of no rule, statutory or judicial, that in such cases bars a third person who was not a party to or concluded by the proceedings and who claims to own the property from asserting his claim against the purchaser in any forum having cognizance of ordinary controversies between individuals.

The order of the Circuit Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Digitized by Google

(153 Fed. 571.)

BETTIS v. FREDERICK LEYLAND & CO. Limited.

(Circuit Court of Appeals, Fifth Circuit. March 12, 1907.)

No. 1,585.

SHIPPING—INJURY OF STEVEDORE—LIABILITY OF VESSEL OWNER.

The owner of a vessel which was seaworthy and properly equipped is not liable, under the admiralty law, for an injury to a stevedore's employé caused by the negligence of himself or other employés handling the hatch coverings when discharging the vessel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 342, 349.]

Appeal from the District Court of the United States, Eastern District of Louisiana.

Armand Romain, for appellant.

Henry P. Dart and Benj. W. Keran, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Judge Parlange gave the following reasons for dismissing the libel:

PARLANGE, District Judge. The sole fault or negligence charged is "that said accident was due entirely to the fault of the agent or foreman of the owner of said steamship and of the mate thereof, who refused to have said burden piece removed while said work was going on; that said burden piece should have been taken off as is regular and customary; that your libelant was unnecessarily subjected to great risk not contemplated, and that your libelant in no way contributed to said injuries." An additional contention is made in the brief, based upon certain testimony, which was objected to, that the burden piece should have been bolted. No such issue was raised by the libel. However, even if it had been raised, the result of the suit would, under my view, be the same. The charge in the libel is not that the ship was unseaworthy, or that she was or that any of her appurtenances were defective. The only charge is that libelant was required to do dangerous work, and that the foreman and mate were negligent as to the manner of directing the work and having it performed. It would seem that on exception of "no cause of action," the libel would have been dismissed. The libel does not aver and the testimony does not show any legal liability on the part of the vessel under the doctrine of The Osceola, 189 U. S. 158–175, 23 Sup. Ct. 483, 47 L. Ed. 760. It may be said incidentally—though the matter is not necessary to the decision of the case—that it would seem that the libelant assumed the risk. In admiralty, the doctrine of assumption of risk is recognized, though the doctrine of contributory negligence does not necessarily defeat an action. The libel must be dismissed at libelant's costs.

These reasons were sufficient and conclusive. The appellant, however, contends that as the original libel was changed from one against the ship to one in personam against the owners, the libelant is entitled to recover because he says the evidence shows that the owners did not furnish the libelant a safe place, and the libelant was made to work in unsafe premises. It would be difficult to point out wherein in cases of this kind a greater liability rests upon the owners than upon the ship. The proctor for libelant has not pointed out the distinction further than as made in his contention. The authorities cited are common-law cases. We need not, however, discuss it, because from the evidence in the case the owners furnished as reasonably safe premises and surroundings for

Digitized by Google

libelant to work in as the nature of the case permitted. The place or premises were only made dangerously unsafe by the negligent handling of the hatch furniture which was entirely under the control of the libelant and his colaborers. They took out enough of the hatch coverings to answer their purpose when they were removing goods from between decks from aft the hatch; and when they changed to removing goods from forward of the hatch they should have taken out the alleged burden piece the subsequent fall of which injured the libelant. For not taking it out, neither the ship nor its owners were in any wise negligent or liable.

The decree appealed from is affirmed.

(153 Fed. 572.)

JOHNSON v. FREDERICK LEYLAND & CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. March 12, 1907.)

No. 1,586.

SHIPPING—INJURY OF STEVEDORE—LIABILITY OF VESSEL OWNER.

Evidence *held* not to sustain the allegations of a libel, that an injury to libelant resulted from a defect in the fittings of a vessel, in view of the rule that a libelant in such case must establish his claim with reasonable certainty.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Armand Romain, for appellant.

Henry P. Dart and Benj. W. Kernan, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In dismissing the libel in this case, Judge Parlange gave the following reasons transmitted in the record:

Memorandum of Reasons for Dismissing Libel.

PARLANGE, District Judge. The libelant was bound to make his case reasonably clear and certain. A careful perusal of the evidence entirely fails to convince me that the facts as alleged in the libel are true. The fault charged is that the burden piece was too short. If this had been proven, the vessel would be liable. But it is contended on behalf of the claimants that the cause of the accident was that the libelant or his fellow laborers did not put the burden piece in the place intended for it. If this is true, the vessel is not liable. No failure of supervision by the foreman of the officers of the vessel, could, under the circumstances of this case, render the vessel liable. As to all of these conclusions, see The Osceola, 189 U. S. 159–175, 23 Sup. Ct. 483, 47 L. Ed. 760. The least that can be said as to the effect of the testimony is that it leaves the libelant's case in such uncertainty that a decree in his favor would not be justifiable. But it may be that there is a preponderance of proof against the libelant, although it is not necessary to so find, in order to dismiss the libel. Any bias which the witnesses for the claimants may have had, resulting from the fact of their employment by the vessel, is offset by other considerations operating on libelant's witnesses in his favor. In all cases similar to the present one, a decision can be reached with almost absolute certainty, on the testimony of one or more disinterested witnesses charged to view and survey the alleged defective appliance. It is evident to me, under the evidence, that it was in the power of either party in this case to have a survey made. As the case is not one in which the party alone

Digitized by Google

could have had a survey made, no presumption arises against the claimants. It seems that the law is that when it is in the power of either party to produce certain evidence and neither produces it, no presumption arises against either. 11 A. & E. Enc. Law (2d Ed.) p. 504, note; vol. 22, A. & E. Enc. Law (2d Ed.) p. 1262. Still, the fact remains that it was in the power of the libelant to have had a survey made and it was his duty to make his case reasonably clear and certain. He has not done so though having the means. The decree must therefore be against him. The libel must be dismissed at libelant's costs.

We are not prepared to say that under the evidence it was in the power of either party in the case to have had a survey made—certainly not equally in the power of either party, for consideration must be given to the fact that the libelant, following his injuries, was laid up, and the ship very soon sailed away. It is true the ship returned at a later date, but then a survey, to be conclusive, would have needed to be supplemented with proof that there had been no changes made in the alleged defective burden and fore and after pieces of the third hatch, and this would have been more in the power of the owners than of the libelant. However this may be from a very careful consideration of the case, keeping in mind that the libelant was bound to make his case reasonably probable and certain, we are unable to find that the trial judge erred in dismissing the libel.

The judgment of the District Court is affirmed.

(153 Fed. 573.)

LESTERSHIRE LUMBER & BOX CO. v. W. M. RITTER LUMBER CO.

(Circuit Court of Appeals, Second Circuit. April 8, 1907.)

No. 189.

SALES—WARRANTY OF QUALITY—EFFECT OF ACCEPTANCE.

A provision of an executory contract for a sale of lumber that "it is understood that this stock will be dry and in condition to work on arrival," if construed as a warranty, is not one which survived the acceptance and retention of the lumber by the purchaser, under the law as settled by decision in New York; the condition of the lumber being obvious on inspection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 818.]

Wallace, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of New York.

The case comes here upon the pleadings and the report and opinion of the referee to whom the issues were referred by stipulation of the parties.

Carver, Deyo & Hitchcock, for plaintiff in error.

Kernan & Kernan, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. After a careful examination of the report and able and comprehensive opinion of the referee we see no reason to disturb his conclusions of law.

The only question which we regard as at all doubtful is that presented by the second and third assignments of error, namely, whether or

Digitized by Google

not the referee erred in finding that the provision of the contract, "It is understood that this stock will be dry and in condition to work on arrival" was a sale by words of description only, not constituting an express warranty, there being in no event a warranty which survived the acceptance of the lumber.

The defendant was entitled to have dry and workable lumber delivered; its condition in this regard was obvious and could have been easily ascertained by defendant's inspectors. It is not a case of secret imperfections or latent defects. With full opportunity to discover the condition of the lumber as to dryness, the defendant, having ascertained the facts, was under no obligation to keep the lumber if not up to the contract standard, but, having accepted and used it, the warranty, even assuming the language used to be in the nature of a warranty, was lost; it did not survive the acceptance.

There is some conflict of authority upon this question, but we agree with the referee that the facts bring the controversy within the rule of Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305. In that case the plaintiffs converted the property and months after delivery and acceptance brought an action to recover damages resulting from its being improperly cured and being in bad condition when delivered. The defendant had agreed to deliver the merchandise (tobacco) "well-cured and boxed, and in good condition." The court held that in an executory contract of sale the right to recover damages because the goods do not correspond with the contract will not survive an acceptance and retention of the property with full opportunity to ascertain the defect, in the absence of notice to the vendor or proof of fraud.

Reed and Randall is a leading case and has been the law of New York for nearly half a century. Its application has by subsequent adjudications been somewhat circumscribed, but we think it cannot be distinguished on the facts from the present controversy.

See, also, Waeber v. Talbot, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712; Gentilli v. Starace, 133 N. Y. 140, 30 N. E. 660; Studer v. Bleistein, 115 N. Y. 317, 22 N. E. 243, 5 L. R. A. 702.

It follows that the judgment must be affirmed with costs.

LACOMBE, Circuit Judge. I concur in the result arrived at by Judge COXE because I am of the opinion that the provision as to dryness of the timber was not a warranty.

WALLACE, Circuit Judge. I dissent. In my opinion there was an express warranty as to the condition of dryness, as well as to the quality, of the lumber, and the defendant was not precluded by accepting the lumber, after an opportunity to discover that it did not comply with the warranty, from recovering by way of recoupment the damages resulting from the breach. See Bagley v. Cleveland Rolling Mill Co., 22 Blatchf. 342, 21 Fed. 159, and Zabriskie v. C. V. R. R. Co., 131 N. Y. 72, 29 N. E. 1006.

Digitized by Google

(153 Fed. 575.)

W. M. RITTER LUMBER CO. v. LESTERSHIRE LUMBER & BOX CO.

(Circuit Court of Appeals, Second Circuit. April 8, 1907.)

No. 177.

1. SALES—CONSTRUCTION OF CONTRACT—ACTION FOR BREACH.
An order for lumber given in January, 1902, stating that "you may enter our order for 4,000,000 feet of shipping cull poplar of same grading as that furnished us by you during the year 1901 and in accordance with our contract dated February 18, 1901," did not render the contract made by its acceptance a continuation of the prior contract, which is referred to merely in connection with the grade, and especially where the price named was different, and a breach of the first contract by the purchaser afforded no ground for the refusal of the seller to perform the second.

2. APPEAL AND ERROR—REVIEW—FINDINGS OF FACT BY REFEREE.
Where the testimony taken before a referee is not in the record as sent to an appellate court, his findings of fact, or upon mixed questions of law and fact, cannot be reviewed.

In Error to the Circuit Court of the United States for the Northern District of New York.

For opinion below, see 144 Fed. 568.

On writ of error to review a judgment for $24,397.33 damages, interest and costs, entered April 17, 1906, in favor of the plaintiff for damages occasioned by the failure of the defendant to deliver lumber to the plaintiff pursuant to an order for 4,000,000 feet of lumber, dated January 2, 1902, which order was duly accepted by the defendant. The case comes here upon the pleadings, report and memorandum of the referee and also upon the opinion of the judge of the Circuit Court, delivered upon plaintiff's motion for judgment and defendant's motion for a new trial.

John D. Kernan and Kernan & Kernan, for plaintiff in error.

I. T. Deyo and Carver, Deyo & Hitchcock, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The order out of which this controversy arises is as follows:

"Lestershire, N. Y., Jan. 2, 1902.

"W. M. Ritter Lumber Co., Columbus, Ohio:

"You may enter our order for 4,000,000 feet of shipping cull poplar of same grading as that furnished us by you during the year 1901 and in accordance with our contract dated February 18, 1901. It is understood that this stock will be dry and in condition to work on arrival. Shipments are to be made during the year 1902 as we direct, and all the 4,000,000 feet is to be taken on or before January 7, 1903. It is also understood that you will deliver this stock by way of the Erie Railway at Endicott or Lestershire as we may direct and that the price will be $17 per thousand feet, delivered at either of the points named.

"Yours very truly, Lestershire Lumber & Box Co."

The defendant refused to execute the order for the reason that the plaintiff had neglected to pay for lumber sent pursuant to prior orders, which neglect resulted in a suit and a recovery against the Lestershire Company, the writ of error to review the judgment (153 Fed. 573, 82 C. C. A. 527) being argued cotemporaneously with the writ in the present action. The sole question of importance now to be determined is, was the order of January 2, 1902, a continuation of the previous agreement of

Digitized by Google

February 18, 1901, or was it a separate and independent agreement? If the latter, a breach of the 1901 agreement constituted no defense.

The question turns practically upon the construction to be given the words "and in accordance with our contract dated February 18, 1901." With these words omitted it cannot be seriously contended that there is any substantial ground for the contention that the 1902 contract was merely a continuation of the earlier one. Both the referee and the judge find that these words were inserted merely as a convenient method of determining the grade. The referee says of the 1902 order and acceptance:

"It is a contract complete in itself and having a different price for the lumber. The fact that the lumber is to be of the same grade as that furnished in 1901 in accordance with the contract of February, 1901, does not make the order of January, 1902, a continuance of the former one, or supplemental to it. It simply states a method of determining the grade to be furnished. The contract is a new one at a different price."

The judge says:

"The only reference in the order of January 2d to the order of February 18, 1901, is in the following language: 'You may enter our order for 4,000,000 feet of shipping cull poplar of same grading as that furnished us by you during the year nineteen hundred and one and in accordance with our contract dated February 18, 1901.' It cannot be reasonably contended that the words 'and in accordance with our contract dated February 18, 1901,' refer to anything more than the grade of the lumber to be furnished under the order. These words have no reference to any contract made February 18, 1901, to deliver a further quantity of lumber."

It is argued by both parties that it was proper in construing the agreement, which is not free from ambiguity, to take into consideration the circumstances surrounding the transaction. U. S. v. Peck, 102 U. S. 64, 26 L. Ed. 46; Empire State Type Co. v. Grant, 114 N. Y. 40, 21 N. E. 49. This is true and the referee who saw and heard the witnesses decided the issue in favor of plaintiff. Under the rule as laid down in this circuit (Chicago Co. v. Clark, 92 Fed. 968, 35 C. C. A. 120), the testimony has not been returned and we have no means of determining what the surrounding circumstances were except as they may be inferred from the report. It is manifest that we cannot reverse the finding of the referee upon questions of fact, or upon mixed questions of law and fact. St. Louis v. Rutz, 138 U. S. 226, 241, 11 Sup. Ct. 337, 34 L. Ed. 941.

We see no reason to disturb the conclusion that the 1902 agreement was independent of all the previous dealings between the parties. There can be no question as to the breach of this contract. We think the referee correctly assessed the damages.

The judgment is affirmed with interest and costs.

Digitized by Google

(153 Fed. 678.)

In re BENNETT.

(Circuit Court of Appeals, Sixth Circuit. March 12, 1907.)

No. 1,603.

1. BANKRUPTCY—DISTRIBUTION OF ESTATE—PRIORITIES UNDER STATE LAW.

While a state law cannot of its own force determine priorities under a national bankruptcy law, Bankr. Act July 1, 1898, c. 541, § 64b(5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], which provides that "debts owing to any person who by the laws of the state * * * is entitled to priority" shall be given priority in the distribution of the bankrupt's estate, adopts the law of the state, and makes it the applicable federal law in determining priorities.

[Ed. Note.—Effect of national bankruptcy act on state insolvency laws and on assignments for benefit of creditors, see note to Carling v. Seymour Lumber Co., 51 C. C. A. 11.]

2. SAME—CLAIM FOR MATERIALS FURNISHED TO MANUFACTURING COMPANY—KENTUCKY STATUTE.

Ky. St. 1903, § 2487, which provides, inter alia, that persons who shall have furnished materials or supplies for the carrying on of the business of any manufacturing company shall have a lien therefor on its property and effects involved in the business, when the same shall be assigned for the benefit of creditors, or shall in any way come to be distributed among creditors, whether by operation of law or by act of such company, which lien, as provided by following sections, is superior to any mortgage or incumbrance thereafter created, while it may not create a technical lien until the happening of one of the conditions mentioned, gives a substantial right in or inchoate lien upon the property from the date of the furnishing of the material or supplies which comes within the spirit and purpose of Bankr. Act July 1, 1898, c. 541, § 64b(5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], and on the bankruptcy of the company entitles such a claim to priority over the claims of general creditors.

3. SAME—STATUTES—CONSTRUCTION—KENTUCKY LIEN STATUTES.

Ky. St. 1903, § 2494, which provides that "no lien provided for in this article" shall attach, unless a claim therefor is filed in the county clerk's office within 60 days after the last day of the last month in which any labor was performed or material was furnished for which the lien is claimed, refers solely to liens provided for in section 2492 for labor or materials furnished in the construction of works of public improvement, and has no application to the liens given by section 2487 for materials or supplies furnished to a manufacturing company in case of the distribution of its property among creditors, notwithstanding the general language "lien provided for in this article"; the two classes of liens having their origin in different statutes, which with a third were carried without substantial change into the article in question, and sections 2492 to 2495 inclusive comprising one of the prior acts, while section 2487 formed part of another.

4. SAME—CLAIMS ENTITLED TO PRIORITY—EFFECT OF ASSIGNMENT.

A claim which is given priority by Bankr. Act July 1, 1898, c. 541, § 64b(5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], because of a state statute by which the right of priority is given to the debt, and not to the creditor, may be assigned before bankruptcy, and the right of priority will pass to the assignee.

Petition to Review an Order of the District Court of the United States for the Eastern District of Kentucky.

O. T. Wimberly and A. R. Burnam, Jr., for petitioner.

John B. Baskin, for respondent.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

Digitized by Google

LURTON, Circuit Judge. The question is whether the claims of the appellees against the bankrupt's estate were properly allowed priority of payment as debts which by the law of the state are entitled to priority under section 64b(5) of the bankrupt act. Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]. The bankrupt is a manufacturing corporation organized under the law of Kentucky, and doing business in that state. The claims are for materials supplied to and used in the business of the bankrupt corporation. Priority is claimed by virtue of section 2487, Ky. St. 1903. The trustee admitted the debt, but denied priority. The bankrupt court held that the debt was one entitled to priority under the statute referred to. From this judgment allowing the debt as a prior claim, the trustee has appealed, and also filed a petition for review.

If under section 2487, Ky. St. 1903, a priority is accorded to claims of creditors of such companies as the bankrupt corporation for materials and supplies furnished to carry on the business of the bankrupt, is that right of priority lost by reason of the operation of the bankrupt law? It is not a question as to whether the bankrupt law is a law superior within its field to a state law in the same field, but a question whether a priority given is preserved by the bankrupt law. This is answered by section 64b(5) of the bankrupt act. That provides that "debts owing to any person who by the laws of the state or of the United States is entitled to priority" shall be entitled to priority in the distribution of a bankrupt's general estate. Counsel for the trustee say that the Kentucky statute referred to above "applies only to the distribution of insolvent estates in the courts of Kentucky, and has no application to the distribution of estates under the national bankrupt law." It is idle to consider whether a state law can of its own force determine priorities under a national bankrupt law. No such contention is made or could be sustained. But it is another thing when the national bankrupt law prescribes that effect shall be given to state laws which do give priority to certain debts. The Congress might have dictated a single and uniform rule of distribution. If it had, that would have been the absolute law, notwithstanding state laws prescribing a different rule. But Congress has elected to prescribe as one rule of distribution that debts entitled to priority under any state law or law of the United States shall be accorded a like priority in the distribution of a bankrupt's estate. The law which we administer is thus the national bankrupt law; that is, the preference in bankruptcy, thus accorded, is a preference prescribed by the bankrupt law which for this purpose adopts the law of the state as the applicable federal law. This is the view which has been taken by many careful judges and accords with our own view.

In re Wright (D. C.) 95 Fed. 807, is a decision by Judge Lowell which was affirmed by the Circuit Court of Appeals in a case reported under the style of In re Worcester County, 102 Fed. 808, 815, 42 C. C. A. 637. In that case there was involved a priority given to the county under the insolvent laws of Massachusetts. It was held that this priority was preserved by section 64b(5) of the bankrupt act.

In the case styled In re Crow (D. C.) 116 Fed. 110, 112, a question arose as to whether a debt due by a bankrupt guardian to his ward was

Digitized by Google

entitled to priority by reason of a Kentucky statute, which provided that, in the distribution of an insolvent's estate, debts due as guardian should be preferred. Judge Evans very tersely sustained the right of priority, saying that:

"The bankrupt law does not in such cases supersede or mean to supersede the operation of the state law. On the contrary, the bankrupt act expressly recognizes the existence of the state statute, and makes that statute the basis for allowing priority of payment to certain classes of claims agains the debtor. Its effect is, in the most manifest way, to keep alive such provisions of the state law as give priority of payment, and while the bankrupt law, speaking generally, does by its operations supersede the force of any state laws which conflict with it the case before us presents an exception to the general rule, whereby the applicable provisions of the state law are expressly enforced through the bankruptcy act itself."

In Re Falls City Shirt Manufacturing Co. (D. C.) 98 Fed. 592, Judge Evans gave priority for a claim for rent because, under section 2317, Ky. St., such a claim was a lien upon the property of the renter upon the premises. He also sustained a claim under 2487, the provisions here involved.

In Re Daniels (D. C.) 110 Fed. 745, costs, incurred in an action against the bankrupt prior to the adjudication, which would constitute a preferred claim under the insolvency statutes of Rhode Island, were held entitled to priority under section 64b(5).

In Re Byrne (D. C.) 97 Fed. 762, a preference given by a statute of Iowa to labor claims was given a priority over a landlord's lien, because that was held to be the order of priority under the Iowa statute preserved by section 64b(5).

In Re Goldberg Bros. (D. C.) 144 Fed. 566, priority was given to costs incurred by an attaching creditor, because under the insolvent statutes of Maine priority was given to such costs "if the suit was commenced in good faith for the benefit of all the creditors."

In the case styled In re Laird, 109 Fed. 550, 554, 48 C. C. A. 538, the question was whether certain claims for labor were a prior charge upon the funds in a bankrupt trustee's hands. The result depended upon the construction of section 3206a, Rev. St. Ohio 1906. The applicable part was in these words:

"And in all cases where property of an employer is placed in the hands of an assignee, receiver or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver or trustee, is appointed shall be first paid out of the trust fund in preference to all other claims against such employer, except claims for taxes and costs of administering the trust."

Judge Day, now Justice Day, for this court, said:

"It is not specifically stated in this connection that the claim in favor of the laborer thus to be preferred shall be a lien upon the debtor's property, but it is provided that, in the event property of an employer is placed in the hands of an assignee, receiver, or trustee, such claim shall be first paid out of the trust funds in preference to all other claims, excepting only taxes and costs of administering the trust. As the statute reads claims of all classes are to be postponed to the labor claims accruing within the period mentioned whether the same have theretofore constituted liens upon the property or not. It is the manifest purpose of this statute to give this class of claims a preference over all other demands whatsoever, with the exception of taxes and costs of administration."

Digitized by Google

The decision was, however, rested upon the proposition that the property came into the trustee's possession charged with the prior payment of the labor claims which was held to be, in legal effect and force, a lien created by the statute of the state, and thus not avoided by the bankrupt law. The learned and industrious counsel for the appellant have with modest earnestness contended that the cases cited, which sustain preferences given by state statutes, are not sound. They cite to support their view Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, In re Allen (D. C.) 96 Fed. 512, In re Young (D. C.) 96 Fed. 606, and In re Beaver Coal Co. (D. C.) 107 Fed. 98. The claim for a lien for professional services denied in Randolph v. Scruggs was for services in preparing a deed of general assignment, which, having been made within four months of bankruptcy, was avoided as a consequence of the adjudication of bankruptcy. This deed of assignment provided that the fees of Randolph et al. should be first paid by the trustee thereunder; but the court said that the effect of avoiding the deed of assignment was to avoid it as a whole, and that the "appellants can assert no preference by way of lien under the deed." There was no claim of any preference under any state statute given to counsel preparing such an assignment. The assignment was valid under the law of that state, but when it was avoided the security provided by the deed for the professional services stood upon no better footing than the security provided by the same instrument for every other debt of the assignor. The case is not in point at all. In Re Allen the claim to a preference was for the costs of an attachment proceeding against the bankrupt, before bankruptcy, which was avoided as a consequence of an adjudication in bankruptcy. The only claim to a right to a preference grew out of the lien secured for the debt and costs by the attachment proceeding; but, as that lien was avoided by the bankruptcy, the lien for the costs of the action went the same way. There was no statute of the state of California making the costs in such a proceeding a preferential claim in the distribution of the insolvent's estate, as was the fact under the law of Rhode Island and the law of Maine as applied in the cases touching costs, cited above, of In re Daniel and In re Goldberg Bros. The same criticism applies to In re Young. In re Beaver Coal Company is in conflict with the cases giving priorities to costs of proceedings against an insolvent set aside as an effect of a state insolvent law. Judge Bellinger does not seem to deny that a debt entitled to priority under a state law is preserved by section 64b(5) of the bankrupt law, but rather to hold that costs under the proceedings avoided by the bankrupt adjudication do not constitute a debt preferred under section 64b(5), although such costs would have been a preferred debt under the insolvent statute of Oregon.

That the unmistakable purpose of the Kentucky statute was to secure a priority to material and supply claims furnished to such a company, as described in the section heretofore set out, under almost every imaginable situation, we have no doubt. Thus a "lien" was declared to exist whenever the property of any such manufacturing company "shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for benefit of creditors,

Digitized by Google

or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator." By section 2490, the lien arises whenever "the debtor shall suspend, sell or transfer such business or when the property or effects engaged in such business shall be taken in attachment or execution, so that the business shall be stopped or suspended." By section 2491, this inchoate right to the appropriation of the property of such a debtor is declared to be "superior to the lien of any mortgage or other encumbrance thereafter created." That the technical "lien" of this article does not arise until the occurrence of one of the conditions mentioned may be true, and such is the intimation of the Kentucky Court of Appeals in Winter v. Howell's Assignee, 109 Ky. 163, 58 S. W. 591, and of this court in Ohio Falls, etc., Co. v. Central Trust Co., 71 Fed. 916, 18 C. C. A. 386.

But when, before the happening of one of the conditions which precede the technical "lien" of the statute, there exists from the origin of the debt a right to the ultimate application of the debtor's property to its payment, a right so tangible and specific as that it cannot be defeated by alienation, mortgage, or other incumbrance, nor by any process of law, receivership, assignment, or insolvency proceedings, a right which fastens itself so strongly that it adheres even after the death of the personal debtor, it is impossible to draw any very solid distinction between the equitable consequences of such a right and those of a full technical lien. The purpose of the postponement of the creation of the ripened lien until the happening of the events named would seem to be to give an equality of lien to all claims of like character then existing, rather than to each a "lien" from the date of the furnishing of materials and supplies. This purpose is not inconsistent with the acknowledgment of an inchoate right or incipient lien from the time of the furnishing of the materials, which becomes a ripened lien and fixed charge when the event happens which is named in the statute. Ohio Falls, etc., Co. v. Central Trust Co., cited above.

In Central Trust Company v. Richmond, etc., Ry. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458, we held that under section 2494, providing that no lien should attach unless the claim should be filed within the time there stated, that an inchoate or incipient lien originated with the beginning of the work or the delivery of the materials and continued as such incipient lien until perfected by the filing of the requisite notice or lost by failing to do so, as required. From the happening of one of the events named, the equitable or inchoate charge becomes a fixed lien and cannot be displaced by later debts. It may be that, if no "lien" in the technical sense of the statute existed when the bankruptcy occurred, no lien in the same sense could arise after bankruptcy. For the purposes of this case, we need go no further than hold, as we do, that this unfixed or incipient charge, a charge so effectual as to be incapable of defeat by any act of the debtor or of other creditors, or any proceeding by which the property shall "come to be distributed among creditors by operation of law or act of the debtor," manifests so plain a purpose that such debt shall be given priority as to come clearly within the spirit and purpose of section

Digitized by Google

64b(5) of the bankrupt act. Indeed, the decided cases go so far in preserving such an inchoate charge or incipient lien as to give to it all the effect of a lien. This is the plain teaching of our own case of In re Laird, heretofore cited, followed in Re City Trust Co., 121 Fed. 706, 58 C. C. A. 126.

A statute of New Jersey, giving to mechanics and materialmen a lien, provided "that no debt should be a lien, by virtue of this act, unless a claim is filed," etc., within a time named. Before this was done, bankruptcy of the debtor ensued, and it was claimed there, as here, that, as there was no technical lien when adjudication occurred, none could arise thereafter. Judge Blatchford, district judge, so ruled; but Judge Woodruff, on appeal, held that the lien attached as of the time of furnishing the materials, and reversed the ruling of the lower court. In re Dey, 9 Blatchf. 285, Fed. Cas. No. 3,871.

A statute of Pennsylvania provided that, when property upon rented premises and liable to distraint should be seized on execution, the officer making the sale should pay the rent due in preference to the execution creditor. The question was whether such rent due to a landlord should be first paid by the bankrupt estate which was liable to distraint. Justice Swayne, for the court, said:

> "Before the commencement of the proceedings in bankruptcy, the defendants in error might have distrained, and it is agreed that the property upon the premises was more than sufficient to satisfy the demand. The statute of Pennsylvania of June 16, 1836, provides that, where property under such circumstances is seized and sold under execution, the rent due for a period not exceeding one year should be paid first out of the proceeds of the sale. This case is within the equity of that statute."

To the same effect are the cases of In re Hoover (D. C.) 113 Fed. 136, In re Duble (D. C.) 117 Fed. 794, and Wilson v. Penn. Trust Co. (3d Circuit) 114 Fed. 742, 52 C. C. A. 374, all under the Pennsylvania statute requiring priority of payment against an execution upon goods liable to distraint; In re Mitchell (D. C.) 116 Fed. 87, a case under a statute of Delaware which gave a preference to the landlord out of property upon the rented premises. See, also, In re Wynne, Fed. Cas. No. 18,117, In re Bowne, Fed. Cas. No. 1,741, and Kane Co. v. Kinney, 174 N. Y. 69, 66 N. E. 619.

We therefore conclude that the learned bankrupt judge did not err when he held that the claims of the appellees were debts entitled to priority under section 2487, Ky. St. 1903, although a technical lien had not ripened at date of adjudication, and that, under section 64b(5) of the bankrupt act, this right of prior payment would be enforced.

It is next objected that, under section 2494, Ky. St. 1903, appellees were required to file and record their claims in the county clerk's office within 60 days after the last day of the last month in which the materials were furnished, and that they did not do this, and that that section provided that no lien shall attach unless this filing is done. Judge Cochran, after an elaborate consideration of the question, reached the conclusion that section 2494 did not apply to the lien provided by section 2487. In this we concur upon the grounds stated in his opinion.

Digitized by Google

For a part of one of the claims here involved, the Hume Cooperage Company executed a note, and this note was assigned to one of the appellees. Proof of debt has been made by assignor as well as by assignee. The contention is that the statutory preference is given to him who actually furnishes the materials, and that an assignee cannot enforce the lien or priority conferred by the statute. Inasmuch as no statutory filing applies to liens claimed under section 2487, which comes from the act of 1876, the case of Frailey v. Winchester, 96 Ky. 570, 29 S. W. 446, which was based upon sections 2492 to 2495 and a part of the act of 1888, has no application, as neither the assignee nor assignor of a claim under 2487 is required to make the statement required to be made under the provisions which relate to liens under the other sections referred to. Neither does the case of Hutsell v. Banks, 102 Ky. 410, 43 S. W. 469, 39 L. R. A. 403, apply. In that case it was held that the assignees of a rent note could not collect it by the "extraordinary remedy" of distress. Inasmuch as the contingent right of lien under section 2487 does not depend upon the doing of anything by the creditor, there is no reason why a priority or lien, which attaches to the claim rather than to the claimant, shall not be assignable. The case falls under the earlier Kentucky decision of Graham v. Holt, 4 B. Mon. (Ky.) 61. That case accords with the general rule in respect of the assignability of preferential claims. Thus section 64b(4) of the bankrupt act gives a preference to "wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings in bankruptcy. * * *" In Shropshire-Woodliff Co. v. Bush (decided January 7, 1907) 27 Sup. Ct. 178, 204 U. S. 186, 51 L. Ed. 436, the Supreme Court held that "the priority is attached to the debt, and not to the person of the creditor; to the claim, and not to the claimant," and that an assignee before bankruptcy might assert the claim and its priority. In Columbus, etc., R. R. Appeals, 109 Fed. 177, 48 C. C. A. 275, we held that a preferential claim, under the equity rule applied in the administration of an insolvent railroad, might be assigned, saying: "The preference attaching to a labor claim is to the claim, and not to the claimant, and passes with the claim to an assignee." See, also, Trust Co. v. Walker, 107 U. S. 596, 2 Sup. Ct. 299, 27 L. Ed. 490, and Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596.

That personal security was taken by a note made by the debtor corporation did not operate to release the security afforded by the statute; there being nothing inconsistent with an intention to retain and rely upon the lien. Smith v. Wells, 4 Bush (Ky.) 92. Andrews v. Kentucky Citizens' B. & L. Ass'n, 67 S. W. 826, 23 Ky. Law Rep. 2418, is not in conflict, for the note there in suit was made in 1892, and the statute giving the lien claimed provided that the lien authorized by the chapter should have no effect "if security shall have been taken for labor performed or materials furnished." This provision was repealed by Acts 1896, p. 49. In Central Trust Co. v. Richmond Railroad Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458, we held with reference to the lien given under sections 2492–2494,

Digitized by Google

Ky. St. 1903, that, while the right to the lien thus given might be waived by the acceptance of a contract to pay for the work in securities whose existence would be inconsistent with the existence of a lien, the waiver would be only conditional upon the performance by the debtor of his part of the agreement. See, also, Harris v. Youngstown Bridge Co., 90 Fed. 322, 33 C. C. A. 69.

We see no error in the decree, and it will accordingly be affirmed.

NOTE.—The following is the opinion of Cochran, District Judge, in the court below on granting the order herein sought to be reviewed:

COCHRAN, District Judge. Hiram Blow & Co., a creditor of the bankrupt, claims the right to be preferred in the distribution of its assets. The trustee and certain general creditors contest this claim, and the matter is before me for determination.

The bankrupt's business was that of a manufacturer of barrels, and the consideration for the indebtedness on account of which the preference is claimed was heading and staves sold to it to enable it to carry on its business. Sections 2487 and 2491, inclusive, Ky. St. 1903, the first five sections of article 3 of chapter 79 thereof, entitled "liens," confer certain rights on persons furnishing material or supplies to a manufacturer for the carrying on of his business and these sections form the basis of the claim to preference asserted herein. It is important at the outset, therefore, to understand clearly exactly what they provide, and what rights they confer. Section 2487 provides that the employés of any mine, railroad, turnpike, canal, or other public improvement company or of any rolling mill, foundry or other manufacturing establishment and the persons who shall have furnished materials or supplies for the carrying on thereof, shall have a lien on so much of the property and effects of such company, owner, or operator as may have been involved therein, and all the accessories connected therewith, including its interest in the real estate used in carrying on the business when its property and effects "shall be assigned for the benefit of creditors or shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors or shall in any wise come to be distributed amongst creditors, whether by operation of law or by act of such company, owner or operator." By section 2490 it is provided that said lien shall also attach "when any such company, owner or operator shall suspend, sell or transfer such business or when the property or effects engaged in such business shall be taken in attachment or execution so that the business shall be stopped or suspended." Section 2488 provides that said lien shall be superior to that of any mortgage or other incumbrance created after the rendition of the services or furnishing of the materials, and as to wages coming due within six months to that of any mortgage or other incumbrance created before the rendition of the services. Originally the section provided for a superiority of the lien, both as to services rendered and materials furnished, without limit as to extent over a mortgage or other incumbrance created before the rendition of the one or the furnishing of the other; but by an amendment of date March 21, 1896, such superiority was cut down to six months' wages. Section 2489 provides that if upon the happening of any of the contingencies by which the property and effects of the company, owner, or operator are put in process of distribution amongst creditors the business in connection therewith is continued to be operated by the party having them in charge, the net earnings thereof shall be distributed pro rata amongst the employés and materialmen. Section 2490 provides, in addition to what has already been set forth, that in case the lien attaches upon the happening of any of the contingencies set forth therein it may be enforced by proceedings in equity. And section 2491 provides that the plaintiff in such proceeding may unite with him as coplaintiffs any number of similar lienholders, shall make all lienholders and incumbrancers parties, and where the parties are numerous any one or more may be designated by the court to prosecute or defend for the class. It further provides in these words: "Suit must be filed to enforce the lien given by this article within 60 days from the date of the consignment or from the date when the

Digitized by Google

property shall go into the hands of a receiver or trustee or from the date when the business shall be stopped or suspended or the property sold; or the claims for which a lien is asserted must be filed in said time with the person authorized to receive and report claims."

The question has been raised and discussed as to when the lien provided by these sections attaches. Apparently, at least, it does not attach until the happening of one of the contingencies set forth in sections 2487 and 2490. On behalf of claimants, however, it is urged that it is to be implied from certain of the provisions in said sections that the lien attaches at the earlier date of when the services are rendered or materials are furnished. One of the provisions so relied on is that of section 2488, in relation to the superiority of the lien over a mortgage or other incumbrance created before the happening of any of said contingencies. This, however, is not inconsistent with the lien not attaching until the happening of one of said contingencies. A lien subsequent in time may be made prior in right. We have an instance of this in that section itself, in so far as it provides that the lien shall be superior to a mortgage or other incumbrance created before the rendition of services. Again, attention is called to the provisions of section 2489, that the earnings shall be distributed "amongst the persons to whom a lien is hereby given" and of section 2490, that "suit must be filed to enforce the lien given by this article within sixty days," etc. No implication, however, can be drawn from either of these provisions as to when the lien attaches.

Possibly support of the position that the lien attaches when the services are rendered or materials are furnished may be found in certain parts of opinions in certain cases involving statutes providing that, when an execution is levied on a tenant's goods, an officer having it shall first pay the landlord certain rent out of the proceeds of the goods when sold. In the case of In re Wynne, Fed. Cas. No. 18,117, the statute involved provided that no person having by deed of trust, mortgage, or otherwise a lien upon goods of a tenant on the leased premises should remove such goods without paying and securing payment of one year's rent due and to become due, and that any officer who might take such goods under legal process should pay out of the proceeds the rent in arrears and deliver to the landlord sufficient purchasers' bonds for the payment of that becoming due. Mr. Chief Justice Chase said generally: "Liens are of various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt." And concerning the statute involved therein he said: "We cannot doubt that this statute creates a lien in favor of the landlord and a lien of high and peculiar character."

In the case of In re Trim, Fed. Cas. No. 14,174, Judge Bryan, as to the effect of a similar statute, said: "This lien is not dependent on a distress warrant or an execution. The charge on the property or the proceeds of the property is a charge because of the statute. Where there is an execution, the charge is paramount to the levy itself. The very fact that it is paramount to the levy proves that it is a lien. * * * The statute creates the lien, not the execution. It creates a charge upon the property which excludes even an execution. The lien, so far from being created by the execution, ousts it. If it had not a previous existence, how could this be?"

But, however it may be as to statutes of this character, it can hardly be that in case of a statute, as here, expressly providing that a lien shall attach on the happening of certain contingencies, the lien attaches before they happen at an earlier date. And it has been expressly laid down by Judge Hobson, in the case of Winter v. Howell, that the lien provided by the statutory provisions in question herein does not attach until the happening of one of the contingencies set forth therein. In that case the owner of a manufacturing establishment had made an assignment on December 28, 1896, and an employé asserted a lien for one year's salary then due him for services rendered, which covered a period of time before March 21, 1896, the date of the amendment hereinbefore referred to. There was no mortgage or other incumbrance on the property assigned, so that the claimant's rights were in

Digitized by Google

no wise affected by the amendment. But for some reason the question as to whether they were was considered. Judge Hobson said: "It is insisted for appellant that his rights are to be determined by these statutes, and not by the statute in force at the time of the assignment, because his contract of service was made while the former acts were in force. This contention cannot be maintained, for the reason that the employés were given no lien until the assignment was made. Their lien, arising by virtue of the assignment, and not attaching to the property until it was assigned for the benefit of creditors, must be governed by the law in force when the assignment was made."

Judge Lurton said as much in regard to said lien in the case of Ohio Falls Mfg. Co. v. Central Trust Co., 71 Fed. 916, 18 C. C. A. 386. He there said: "But this lien did not actually attach so long as the property remained in the hands of the debtor railway company and was managed and operated by it on its own account."

To the same effect are certain statements of Judge Evans in the case of In re Falls City Shirt Mfg. Co. (D. C.) 98 Fed. 592, to wit: "The landlord's lien was in existence June 17, 1899, at and before the adjudication; but the property of the bankrupts certainly did not come into the hands of the trustee until after that time, and probably not until July 3, 1899, when the trustee was appointed and qualified. Not until that event did the lien of the materialmen arise or exist." And, again: "As already indicated, sections 2487 and 2488 give a lien to the materialmen only when the property goes into the hands of the trustee in bankruptcy and ipso facto that event. That event occurred July 3, 1899. This lien then became at once absolute and fixed."

There is no escaping, then, from the position that the lien in question does not come into existence or attach until the happening of some one of the contingencies set forth in sections 2487 and 2490. Until the happening thereof, the only perfected right which the employé or materialman has is a personal claim against the company, owner, or operator for the amount due him. As to the lien, his right is inchoate and contingent upon such happening. And yet, though it is an inchoate and contingent right, it is still a right. When he renders services or furnishes materials, he can safely act upon the idea that, if one of the contingencies does happen, his lien will attach; and others, when dealing with the company, owner, or operator, are bound to take notice thereof and to act accordingly. The company, owner, or operator is so hedged about by contingencies on the happening of which the lien will attach that the only way in which it can prevent its attaching is for it to retain the ownership of the property and effects engaged in the business and to keep the business going. If it transfers said property and effects to another, if they go into the hands of another for the benefit of creditors, if they are attached or levied upon under an execution, or if it ceases to do business, the lien at once attaches. And when it does attach it overrides a mortgage or other incumbrance created subsequent to the rendition of the services or furnishing of the materials; and, as to six months' wages, a mortgage or other incumbrance created prior to the rendition of the services.

In the case of Ohio Falls Car Mfg. Co. v. Central Trust Co., supra, Judge Lurton referred to this inchoate right of the materialman under the statutory provisions in question herein in these words: "The plain purpose of the act was that the furnishers of materials or supplies should be preferred in the distribution of the assets of an insolvent company over mortgages or other incumbrances theretofore or thereafter created. The most that can be said is that such a creditor, prior to the happening of one or the other of the conditions mentioned in the statute, had an unfixed right in the property of the debtor, amounting at most to an inchoate lien which could be perfected upon the occurrence of one or the other of the conditions precedent named in the statute and the beginning of legal proceedings for its declaration and enforcement within the time and in the manner prescribed by the statute."

Under the mechanic's lien law of New York, no lien attaches until notice of the claim is filed in the proper clerk's office. Judge Brown, in the case of In re Emslie (D. C.) 97 Fed. 929, refers to this feature of said law in these words: "The language of the present statute of New York seems to leave no doubt that the lien in this case does not arise upon doing the work or fur-

Digitized by Google

nishing the material, but only upon filing the notice of claim in conformity with the provisions of the statute, and it is only through this proceeding that the lien is created. It is the lodging of the claim under that statute that binds the property, just as the issuing of an execution to the sheriff under a judgment binds the debtor's goods and chattels."

Notwithstanding this, however, it was held by the Court of Appeals of New York, in the case of Kane Co. v. Kinney, 174 N. Y. 69, 66 N. E. 619, that a party who has furnished labor and material in the erection of a building has an inchoate right before the filing of a notice in the clerk's office, and such an inchoate right that upon filing notice after the making of a voluntary assignment for the benefit of all his creditors his lien will prevail over such assignment. Judge O'Brien said: "The object and purpose of the mechanic's lien law was to protect a person who with the consent of the owner of real property enhanced its value by furnishing materials or performing labor in its improvement by giving him an interest therein to the extent of the value of such material or labor. The filing of the notice of lien is the statutory method prescribed by which the party entitled thereto perfects his inchoate right to that interest. That is the manner and mode of procedure in which the right is asserted. A certain time is allowed in which the lien may be asserted or lost. During that time there is a preferential statutory right, in the nature of an imperfected equitable lien in favor of the laborer, mechanic, materialman, or subcontractor, and when a notice of lien is filed that right is perfected; but, until the 90 days allowed by the statute within which the lien may be filed have elapsed, the right cannot be defeated by the voluntary act of the party against whom it might be asserted, such as a general assignment for the benefit of creditors. If such were the effect of the assignment, no labor or materialman's claim would be secure, and the beneficial purpose of the statute could be defeated, unless a lien was filed at the time the work was commenced and from day to day thereafter. This, however, being a remedial statute, must be construed liberally with a view to carry out its intent and for the accomplishment of every beneficial purpose contemplated. It would therefore seem to be a reasonable conclusion that the assignee for the benefit of creditors takes the title to the estate of his assignor subject to this right of any lienor to assert his lien against the property or the fund within the statutory time; that is, within 90 days."

With this presentation of the provisions of said sections of the Kentucky statutes and the rights they confer, we are in position to determine the question of preference asserted herein. A convenient way to dispose of the matter is to take up and consider the various grounds urged on behalf of the trustee and contesting creditors in support of their contention that claimants are not entitled to the preference claimed.

1. It is so urged, on the ground that none of the contingencies upon the happening of which it is provided that a lien is to attach has happened, and claimants' inchoate right has not, therefore, become perfect.

It must be conceded that none of said contingencies has happened, and that claimants' inchoate right has not become perfect. It is true that the business of the bankrupt has been suspended; but the suspension was not prior to this proceeding, and was not the act of the bankrupt. It was brought about by this proceeding. The suspension contemplated by section 2490 is a voluntary suspension by the company, owner, or operator, and none other. It is true also that the property and effects of the bankrupt have by this proceeding been put in process of distribution amongst its creditors; but this mode of putting them in process of such distribution is not within the contemplation of section 2487. The only modes of so doing contemplated thereby are those specifically mentioned or some other possible mode of which the state courts would have jurisdiction, to which the general language used has reference. The Legislature of Kentucky had no power in and of itself to give any effect to a bankruptcy proceeding or to make provision as to how the property and effects of a bankrupt shall be distributed in such proceeding, and hence did not intend to do so. So it is that I am driven to the conclusion that none of the contingencies contemplated by sections 2487 and 2490 has happened, and plaintiff's inchoate right has never been perfected.

But does it follow from this that claimants are not entitled to the prefer-

Digitized by Google

ence claimed? I think not. There are two distinct grounds upon each of which separately and by itself it may be said that they are entitled to it. One of them may be termed the doctrine of equivalency. It is this: Though none of the contingencies contemplated by the statutory provisions in question has happened, that which is equivalent to certain of said contingencies, to wit, this proceeding, has come to pass, and its coming to pass has prevented the happening of any of the statutory contingencies. It is therefore equitable that the same consequences should follow from this proceeding that would have followed from the happening of one of said contingencies had it not intervened. As it has been put, the case comes within the equity of the statute. In the case of Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451, it was held that the assignee in bankruptcy should pay rent due from the bankrupt to his landlord for a period not exceeding a year prior to the bankruptcy before distributing the proceeds to the creditors generally, because of state statute providing that, where the property of a tenant is seized and sold under execution, rent due for such a period of time should be paid first out of the proceeds of sale, though no execution had been issued prior to the bankruptcy. Mr. Justice Swayne said: "This case is within the equity of the statute."

In the earlier cases of In re Wynne, supra, In re Bowne, Fed. Cas. No. 1,741, and In re Trim, supra, it was held that in the case of the existence of such a state statute the landlord should be first paid his rent before distribution in bankruptcy amongst creditors. The decisions, however, were not put on the ground that the case came within the equity of the statute, but upon the ground that the effect of the statute was to give the landlord a lien before the issuance of an execution, and the assignee in bankruptcy took the bankrupt's property subject to the existing liens.

The following later cases, to wit, In re Hoover (D. C.) 113 Fed. 136, In re Mitchell (D. C.) 116 Fed. 87, and In re Duble (D. C.) 117 Fed. 795, place the landlord's right to preference on the ground that the case comes within the equity of the statute. In the case of In re Hoover, supra, Judge Buffington said: "The bankrupt court having taken possession of this property thus liable for the rent, its process whereby the same was sold must for the purposes of this statute be regarded as an equitable execution. The case is within the equity of the statute." In this case a distress warrant had been issued and levied before the institution of the bankruptcy proceeding. In the case of In re Mitchell, supra, Judge Bradford said: "The right of the landlord, existing by law prior to the adjudication in this case, and requiring no act on his part for its creation and perfection, is, in my opinion, recognized and respected by the bankruptcy act. It is his right to be paid his accrued rent out of the proceeds of the goods and chattels in question which belonged to the tenant until they passed to the trustee in bankruptcy representing the creditors as a debt or demand payable in præsenti. * * * This right is entitled to recognition by the court in bankruptcy either as existing independently of the proceedings in bankruptcy, or as coming within the equity of the Delaware statute." In this case the preference allowed included rent to become due as well as rent already due. In the case of In re Duble, supra, Judge Archbald said: "This preference is preserved under the bankrupt act; the taking of the tenant's goods by virtue of its provisions being regarded as within the equity of the statute."

The case of Morgan v. Campbell, 22 Wall. 381, 22 L. Ed. 796, is in no way in conflict with these decisions. In that case there was no such state statute. The landlord simply had his common-law right of distress, and that right had not been exercised prior to the bankruptcy proceeding. It was held that the landlord's claim for rent was not entitled to preference. Though, in the case of Austin v. O'Reilly, Fed. Cas. No. 665, Mr. Justice Bradley held that the landlord was entitled to preference solely because of his right to distrain. His view as to the effect of a statute as to priority of payment in case an execution is levied on the tenant's goods is indicated in these words: "This right of the landlord has been regarded as peculiarly entitled to priority when by statute an execution creditor of the tenant is prohibited from removing the goods until he has paid the landlord's rent or a reasonable amount (generally a year's rent) which may have accrued. Then, in Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451, the Supreme Court places special em-

Digitized by Google

phasis on this fact." This case, though decided about two months after Morgan v. Campbell, seems not to have had it in view.

The doctrine of equivalency has been applied in analogous instances in another particular. In the case of In re Brunquest, Fed. Cas. No. 2,055, a mechanic's lien was involved. The statute required a statement to be filed in a certain time and suit to be brought in another certain time after the filing of the statement. No suit was brought within the required time, but the bankruptcy proceeding was instituted within the time in which suit was required to be brought. The mechanic did not assert his lien therein within that time. It was held that he had lost his lien, but conceded that if he had asserted his lien there in proper time it would have been preserved on the ground that such assertion thereof was equivalent to bringing suit. Judge Dyer said: "I think there can be no doubt that these lien claimants could, as an equivalent for commencing suits in the state courts, have asserted or proved their liens in the bankruptcy proceedings, within the time limited by the statute creating the liens; but this was not done. To preserve a statutory lien dependent for its continued existence upon observance of the terms, they must be complied with by performance of the required act or its equivalent." And, again: "My conclusion is that because of this failure either to commence a suit in the state court for the enforcement of these demands within four months after the filing of petitions, or to do that in this court which would be equivalent to the commencement of such suits, namely, to present the claims to this court in these bankruptcy proceedings within four months for recognition and enforcement, these liens must be said to have lapsed and cannot now be recognized."

In the case of In re Kerby Dennis Co. (D. C.) 94 Fed. 818, Judge Seaman also held that the assertion of such a lien in bankruptcy proceedings was equivalent to bringing a suit in the state court to preserve the lien. He said: "With the lien kept alive and identified as the statute directs, I have no doubt this court could furnish a remedy equivalent to the action in the state court."

In this particular the equivalent act preserves the lien created by a state statute. In the former particular it gives rise to the lien or preferred right contingently provided for by the state statute. Possibly it is upon some such ground as this that the ruling in the case of In re Grissler, 136 Fed. 754, 69 C. C. A. 406, is to be placed. It was there held that in New York, the peculiarity of whose mechanic's lien law has been heretofore referred to, the mechanic is entitled to a preference in bankruptcy if he files the notice of his lien within the statutory period, even though he does not do so prior to the institution of the bankruptcy proceedings. In referring to the decision of the New York Court of Appeals in Kane Co. v. Kinney, supra, Judge Wallace said: "The court distinctly decided that the inchoate right acquired by the materialmen when perfected by the filing of his notice of lien, though filed subsequent to a general assignment of the contractor for the benefit of creditors, was superior to the right acquired by the assignee. A trustee in bankruptcy of the contractor or subcontractor stands in no better position than would the general assignee."

In the earlier case of In re Roeber (D. C.) 121 Fed. 444, the same court had held otherwise; but this decision was overruled by the later case.

Somewhat of the same idea seems to have been controlling in the Massachusetts case of Jones v. Arena Pub. Co., 171 Mass. 22, 50 N. E. 15. It was there held that the priorities created by the insolvent law should control the distribution of an estate in the hands of receivers. Judge Barker said: "It would be a plain injustice if a general creditor by resorting to equity for the administration of its debtor's goods, merely for the reason that by its aid the amount to be divided would be larger, could gain a farther advantage by reducing to the level of common creditors workmen whose wages would have priority if the assets were left to be administered at law or could thus place his own debts upon an equality with taxes which would have been paid in full had not equity intervened. The defendant corporation was subjected to our insolvency law by force of St. 1890, p. 287, c. 321, and if equity had not come in to conserve and distribute its legal assets the wages of its workmen and the taxes due from it would have priority in the distribution of its assets by the usual agencies of the common law. These agencies could not keep its

Digitized by Google

business going until the enactment of St. 1897, p. 86, c. 120. For this reason only the creditors, merely to increase the amount of the fund, asked equity to interfere in behalf of all creditors alike. It would be unjust if that interference should be at the expense of the workmen and of the public through depriving claims for labor and taxes of the priority of payment which they would have had if equity had not intervened."

Judge Lowell, in the case of In re Wright (D. C.) 95 Fed. 807, 811, said that it was "by analogy" the Supreme Court of Massachusetts so held.

The other ground upon which claimants are entitled to the preference asserted, though none of the contingencies contemplated by the statutory provisions in questions has happened, is that the bankrupt act has expressly so provided. This it has done in section 64b(5). By that clause it is provided that, amongst debts having priority and entitled to be paid in full out of the bankrupt's estate, are "debts owing to any person who by the laws of the state or the United States is entitled to priority."

In the cases of In re Hoover, supra, and In re Mitchell, supra, the preference allowed the landlord was based upon this ground also. In the Hoover Case, Judge Buffington said: "Such liens and priority by virtue of the Pennsylvania statute was one recognized and enforced by section 64b(5) of the bankrupt act." And in the Mitchell Case, Judge Bradford said: "I have no doubt of the priority of the claim under section 64b(5) of the bankruptcy act as a debt owing to the landlord who by the laws of Delaware is entitled to priority over other creditors of the tenant."

In the case of In re Crow (D. C.) 116 Fed. 110, Judge Evans held that a balance due from a guardian to his ward was entitled to preference in the distribution of the estate of the guardian in bankruptcy by virtue of section 64b(5) of the bankrupt act, because the statutes of Kentucky provided that in the distribution of an insolvent's estate, whether under a general assignment for the benefit of creditors (Ky. St. 1903, § 74), or upon a conveyance in contemplation of insolvency being converted into such an assignment when attacked within six months (Ky. St. 1903, § 1916), or upon his death (Ky. St. 1903, § 3868), debts due by a guardian shall be paid in full before any payment is made to general creditors. He said: "I am of opinion that the bankrupt law does not in such cases supersede, or mean to supersede, the operation of the state law. On the contrary, the bankrupt act expressly recognizes the existence of the state statute, and makes that statute the basis for allowing priority of payment to certain classes of claims against the debtor. Its effect is, in the most manifest way, to keep alive such provisions of the state law as give priority of payment; and while the bankrupt law, speaking generally, does by its operation supersede the force of any state laws which conflict with it, the case before us presents exception to this general rule, whereby the applicable provisions of the state law are expressly enforced through the bankruptcy act itself."

It is suggested by counsel for trustee and contesting creditors that the claimant in this case would have been entitled to preference even if there had been no such state statutes, and Perry on Trusts (5th Ed.) vol. 1, § 345, and Collier on Bankruptcy (5th Ed.) p. 558, are cited as upholding this position. They simply recognize that, if the ward's estate can be traced in the hands of the assignee in bankruptcy or other trustee for benefit of creditors and identified, he is entitled to same as against the creditors. On the other hand, they lay down the proposition that, as such cannot be done in the absence of statute, the ward stands on the footing of a general creditor and has no greater rights. To this effect are the following decisions, to wit: In re Richard (D. C.) 104 Fed. 792; In re Marsh (D. C.) 116 Fed. 396; In re Mulligan (D. C.) 116 Fed. 715; In re Kurtz (D. C.) 125 Fed. 992. In the Crow Case there was no identification of any portion of the ward's estate in the hands of the assignee in bankruptcy. There was merely a balance due him from his guardian, and he was given preference solely on the ground heretofore stated.

The same counsel rely on the decision of the Supreme Court of the United States in the case of Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, as against the position that a priority provided for in a statute touching assignments for benefit of creditors should by virtue of said clause be recognized in a distribution in bankruptcy. There it was held that a claim

Digitized by Google

for professional services rendered to a bankrupt corporation in the preparation of a deed of general assignment valid under the law of the state where made was not entitled to be paid as a preferential claim out of the estate in the hands of the trustee in bankruptcy when the adjudication in involuntary bankruptcy was made within four months after the making of the assignment, and the assignment was set aside as in contravention of the bankrupt law. The right to the preference was not based on any statute of the state providing therefor, but on a provision in the deed of assignment. Of course, as that deed was annulled, every provision in it was annulled with it. Mr. Justice Holmes said: "If by declaring the assignment an act of bankruptcy the statute means that the conveyance shall not be effectual against the bankruptcy proceedings, as is agreed, the natural and simple construction is that it means that the deed shall be avoided as a whole when the trustee takes the goods. The cases which we have cited and others under insolvent and bankruptcy laws evidently take that view. It follows that the appellants can assert no preference by way of lien under the deed."

The state statutes conferring priorities which have been recognized in bankruptcy by virtue of section 64b(5) so far considered are statutes not affected by the bankruptcy act, save in so far as their effect is concerned when bankruptcy proceedings are instituted. To the same extent have priorities conferred by state statutes, in their nature state insolvency laws, and therefore suspended by the bankruptcy act, been recognized by virtue of said provisions of the bankrupt act.

In the case of In re Wright (D. C.) 95 Fed. 807, it was held that a debt due to Worcester county, Mass., by the bankrupt as the price of convict labor hired by him from its house of correction, was entitled to priority of payment in the distribution of the assets of the bankrupt, because by the insolvency law of that state a debt due to a county was made a preferred claim in insolvency proceedings thereunder. It was urged therein that a state insolvency law was not within the meaning of section 64b(5), because it was suspended by the bankrupt act. In answer to this, Judge Lowell said: "The trustee contends that this section is not now a law of the state of Massachusetts, because as a part of the insolvent law of Massachusetts it has been suspended by the bankrupt law of the United States. The argument is more ingenious than sound. The bankrupt law of the United States does not repeal or altogether avoid the insolvent laws of the several states, but merely suspends their operation so far as they come in conflict with the bankrupt act or intrude upon its province." Again, he said: "An insolvent law may be amended, repealed, or enacted by a state during the existence of the bankrupt law; and such amendment, repeal, and enactment will be valid legislative action, though the operation of these acts in some respects be suspended while the bankrupt law continues in force. When the bankrupt law has been repealed, the insolvent laws of the states become operative; and, if amended during the existence of the bankrupt law, they doubtless become operative in their amended form. Counsel for the trustee sought in argument an analogy between the insolvent laws thus suspended and a law unconstitutional, and therefore void; but the analogy is very imperfect. To establish that the insolvent laws of the several states now upon their statute books are not 'laws of the states,' it must be shown that they are not laws at all; that they are wholly void, and not merely restricted in their application. Inasmuch, therefore, as the bankrupt act of 1898 expressly recognizes the existing validity of these insolvent laws as applied to proceedings commenced before the passage of the bankrupt act, and inasmuch as the insolvent laws revive, ex proprio vigore, on repeal of the bankrupt law, it follows that the insolvent laws have not been made wholly void, but are still laws of the states which adopted them." And, again, he said: "Plainly, the phrase 'laws of the states,' in section 64b(5) of the bankrupt act, was intended to have some meaning; and yet, if the trustee is right in his contention only some exceptional, additional and peculiar statutory priorities were recognized by the bankrupt act, inasmuch as the laws of the states regulating priority are generally a part of the insolvent laws. Even if by passage of the bankrupt act the insolvent laws of Massachusetts were so avoided that it has ceased to be a law of Massachusetts, yet nothing would prevent the Legislature of Massachusetts during the exist-

Digitized by Google

ence of the bankrupt law from passing a statute establishing priorities. Such a statute would have almost its sole effect in establishing priorities under the bankrupt law of the United States. It would be simply a re-enactment of the rule regarding the distribution of insolvent estates which had prevailed by statute up to the passage of the bankrupt law. To suppose that Congress meant to require such legislation by the states is unreasonable."

The decision of Judge Lowell in this case was affirmed by the Circuit Court of Appeals in the case of In re Worcester County, 102 Fed. 808, 42 C. C. A. 637. Judge Putnam said: "We are unable to conceive of any priority to which any one may be entitled by the laws of a state, under section 64 of the bankruptcy act, unless it be a priority created by insolvent laws of that character. It is true that priorities are often created by state statutes relating to the administration of estates of deceased persons, and also to proceedings for winding up corporations; but such laws are not of that general character which can be supposed to be within the purview of the provision of the bankruptcy act which is concerned here. Of course, statutes touching assignments for the benefit of creditors must be classed with insolvency laws, strictly so called. It is settled that state insolvency laws are not annulled by the enactment of a bankruptcy act, and that the only effect of such enactment is to suspend their operation, so that they become operative again, without re-enactment, when the bankruptcy act is repealed."

In the later case of In re Lewis (D. C.) 99 Fed. 935, Judge Lowell, upon the same ground, gave priority to fees due to a sheriff accruing on a writ of attachment, founded upon a provable debt, issued before the commencement of proceedings in bankruptcy against the debtor, and continued in force at the date of the petition.

In the case of In re Daniels (D. C.) 110 Fed. 745, also, it was held that costs incurred in an action against a bankrupt, prior to the bankruptcy, which would constitute a preferred claim under the insolvency laws of the state, was entitled to preference in the bankruptcy proceedings.

Counsel for the trustee and contesting creditors question the correctness of these decisions so holding that priorities given by a state insolvency law should be regarded in a distribution in bankruptcy by virtue of section 64b(5). They seem to think that this position is inconsistent with the fact that state insolvency laws are suspended by the bankrupt act, as held in the following cases cited by them, to wit: Ex parte Eames, Fed. Cas. No. 4,237; In re Reynolds, Fed. Cas. No. 11,723; Thornhill v. Bank of La., Fed. Cas. No. 13,992; In re Independent Ins. Co., Fed. Cas. No. 7,017; In re Curtis, 1 Am. Bankr. Rep. 440, 91 Fed. 737; Westcott Co. v. Berry, 4 Am. Bankr. Rep. 264, 45 Atl. 352, 69 N. H. 505. The learned judges who decided those cases did not think that there was any such inconsistency, for they expressly recognized the fact that there was such suspension and held as they did notwithstanding this. Nor can I see any such inconsistency. To so hold is not to give effect to the state insolvency law. In such case it is the bankrupt act alone that gives effect to the priorities set forth in that law, and this it does, not by setting them forth in so many words therein, but by reference to the state insolvency law. The sole relation of that law to the matter is as to the place where the priorities which the bankrupt act by the clause in question provides for may be found. That clause is simply a short way of providing for them, and in view of the great number of state jurisdictions and the existence of different priorities in different jurisdictions, it was the only practical way of providing for them. The only possible question that could arise was whether a state insolvency law can be said to be a law of the state upon and after the enactment of the bankrupt act, so as to come within the description of the clause. That it can be said to be so is demonstrated by Judge Lowell in the extracts from his opinion in the Wright case quoted above. Nor is the suggestion of Referee Dean, in his opinion in the case of In re Crow, supra, sound. It is in these words: "As an undecided question, it might well be doubted whether it be the intention of Congress by clause 5 of section 64b to give effect to provisions in state insolvency laws when the very object and purpose of the bankruptcy law is to supersede state insolvency laws, and the referee would be inclined to hold in the negative." No effect is given to any provision of the state insolvency laws by the position in question. All that has effect is the provision of the

Digitized by Google

bankrupt act, and in referring to the former for a statement of certain of the priorities which it gives in no way prevents its supersession of those laws.

Judge Putnam, in the Worcester County Case, would seem to limit the reference of the clause in question to state insolvency laws. I cannot go that far. It no doubt includes such laws, but it is not limited thereto. Judges Buffington and Bradford, in the Hoover and Mitchell Cases, gave it a wider scope when they held that statutes providing for prior payment of a certain part of the landlord's rent when the tenant's goods are taken under the execution come within the province of that clause. So do statutes providing for priorities in a distribution under a general assignment for benefit of the creditors, as was held in the Crow Case. Judge Putnam, in the Worcester County Case, classed such statutes "with insolvency laws, strictly so called." If he meant by this that such statutes are state insolvency laws, and suspended by the bankrupt act, his position would seem not to be correct. Loveland on Bankruptcy, p. 29.

In the case of In re Rouse, Hazard & Co., 91 Fed. 96, 33 C. C. A. 356, it was held that the provision of the state insolvency law giving priority to labor claims should not be followed in a distribution in bankruptcy, because the bankrupt act (section 64b[4]) has a specific provision giving priority to such claims. Judge Jenkins said: "Our conclusion is that Congress having spoken specifically to the subject of priority of payment of labor claims, what it has said upon that subject expresses the particular intent of the lawmaking power, and the provision is not to be tolled or enlarged by any general prior or subsequent provisions in that act. That which is given in particular is not affected by general words. So that the statute providing for the priority of payment of debts referred to in clause 5 must be construed to mean other and different debts than those specified in clause 4." In the Wright Case, Judge Lowell thus distinguished the decision in the Rouse, Hazard & Co. Case: "The decision was rested solely upon the ground that the specific provisions of the bankrupt act concerning labor claims were intended to override the provisions relating to wages made by the state statute; that the exemption accorded by the state statute would have been valid in the absence of the express provision of the bankrupt act concerning wages was conceded." The following cases are contra of this case: In re Laird, 109 Fed. 551, 48 C. C. A. 538; In re Slomka (D. C.) 117 Fed. 688.

Coming, then, to the statutory provisions in question, it must be held that they are not state insolvency laws, strictly so called, and were not therefore suspended by the bankrupt act. The happening of certain of the contingencies provided for the attaching of the lien will amount to an act of bankruptcy, and the institution of proceedings in bankruptcy within the proper time will invalidate the legal effect of such happenings. To no other extent does the fact of the bankruptcy have any bearing in relation to those provisions. We have here, then, a case of priority given by state laws which are not state insolvency laws, and which are not suspended by the bankruptcy act. An argument directed against priorities given by such laws being recognized in bankruptcy can therefore have no application here. Unless, then, section 64b(5) is limited to priorities so given, the case in hand comes clearly within its purview.

But it is urged by counsel on behalf of the trustee and contesting creditors that the statutory provisions in question do not confer a priority; they only confer a lien; a lien is not a priority; and therefore said provisions are not within the purview of said clause of the bankrupt act. It is true that there is a distinction between a lien and a priority. In the case of U. S. v. Fisher, 2 Cranch, 358, 2 L. Ed. 304, where the question was whether a certain indebtedness due the United States was within a statute providing priority of payment to the United States in case of insolvency or bankruptcy of its debtor, Mr. Chief Justice Marshall arguendo said: "On this subject it is to be remarked that no lien is created by this law. No bona fide transfer of property in the ordinary course of business is overreached. It is only a priority in payment which, under different modifications, is a regulation in common use; and this priority is limited to a particular state of things when the debtor is living, though it takes effect generally if he be dead."

In the case of Conard v. Atlantic Ins. Co. of N. Y., 1 Pet. 386, 7 L. Ed. 189,

Digitized by Google

it was held that an indebtedness due the United States within said statute would not prevail because of its provisions over a specific and perfected lien created by the debtor. Mr. Justice Story said: "What, then, is the nature of the priority thus limited and established in favor of the United States? Is it a right which supersedes and overrides the assignment of the debtor as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing by virtue of such assignment to the assignee? Or is it a mere right of prior payment out of the general funds of the debtor in the hands of the assignee? We are of the opinion that it clearly falls within the latter description." Again, he said: "If, then, the property of the debtor passes to the assignees, if debts due to the United States constitute no lien on such property, if the preference or privilege of the United States be no more than a priority of satisfaction or payment out of the common fund, it would seem to follow as a necessary consequence that, even if the teas in controversy were the property of Edward Thompson, they passed by his general assignment in November, 1825 (which is not denied to have been a bona fide and valid transaction), to his assignees and became their property for distribution amongst his creditors and were not liable to the levy under the execution of the United States." And, again, in distinguishing the case of Thelusson v. Smith, 2 Wheat. 396, 4 L. Ed. 271, he said: "It is obvious that it established no such proposition as that a specific and perfected lien can be displaced by the mere priority of the United States, and that priority is not itself equivalent to a lien."

But the distinction between the two is that a mere priority is not a lien, and not that a lien is not a priority. A lien is a priority. It is that, and something more. That something more is that it is a hold on the property covered by it that fixes the priority so that it cannot be affected by subsequent events. No other distinction was drawn in the cases cited than this. Whilst, then, the statutory provisions in question do not confer a mere priority on the employé and materialman, they do secure him a priority through the lien which they confer. And though the right conferred is termed a "lien" in all instances, there is room for saying that in certain of them it is nothing more than a mere priority or is without greater value than a mere priority. Those instances are when it attaches because the property and effects of the company, owner, or operator are put in process of distribution amongst its creditors in one of the modes specified or referred to generally in section 2487. If the statute had simply provided that in such cases the employés and materialmen should be first paid, the right conferred would have been really in no wise different in its character from and equally as valuable as the lien which it does confer. It is only when the lien attaches, upon the happening of one of the contingencies specified in section 2490 that the right conferred takes on really the character and value of a lien. The difference between the rights conferred in the two cases is recognized by sections 2490 and 2491, in that they provide that in the latter case the lien may be enforced by proceedings in equity, and in the former case all that is necessary to do is to file the claims for which the lien is asserted with the person authorized to receive and report claims. Section 2491 is confused, in that it seems to provide that in the former case an independent suit may be brought to enforce the lien. It certainly does not require a suit in such case as is essential in the other case.

It is upon this line of reasoning that I reach the conclusion that the claimants are entitled to the preference claimed, notwithstanding the fact, which I have conceded, that none of the statutory contingencies has happened, and their inchoate right has not become perfect. Either ground stated is sufficient in and of itself to establish the right to the preference claimed. Under the act of 1867, claimants would have been entitled thereto; but the basis of their right would have been limited to the first ground stated, as in that act there was no provision recognizing priorities conferred by the state laws.

The decision of Judge Evans, in the case of In re Falls City Shirt Mfg. Co. (D. C.) 98 Fed. 592, which involved the statutory provisions involved here, may be said to be authority in support of the conclusion here reached. It really assumes, without discussion, that the lien or priority conferred by those provisions can be asserted in bankruptcy, though apart from the proceedings therein none of the contingencies provided for has happened prior

Digitized by Google

thereto. The right to so assert it, however, is put upon a basis different from that on which I have placed it. The proceedings in bankruptcy and the coming of the property and effects of the bankrupt into the hands of the trustee in bankruptcy for distribution amongst creditors is treated as the happening of a contingency provided for in section 2487, and it is considered that thereupon the inchoate lien or right atttaches and becomes perfect. One question involved and determined therein was as to the priority between the bankrupt's landlord and a materialman. On the idea that said statutory provisions were the only pertinent considerations, it was held that by virtue of section 2488 the former had the prior right. The time of the attaching of the materialman's lien, and not of the creation of his debt, was treated as the time to be compared with that of the creation of the landlord's debt lien. Basing the materialman's right on the grounds put forth herein would probably not bring about a result different from that reached therein. The other question considered and determined therein was as to when it is essential for the materialman to assert his lien in the bankruptcy proceeding in order to preserve it.

In the discussion thus far, I have put to one side certain decisions cited and relied on by counsel for claimants, because I do not deem them relevant to the question in hand. Those decisions are the following, to wit: In re Kerby Denis Co. (D. C.) 94 Fed. 819; Id., 95 Fed. 116, 36 C. C. A. 677; In re Emslie, 102 Fed. 294, 42 C. C. A. 350; In re Laird, 109 Fed. 550, 48 C. C. A. 538. These decisions are not relevant to the question in hand, because they all involved liens which were perfect when the bankruptcy proceeding was instituted. In the Kerby Denis Co. Case the lien was one under a Wisconsin statute creating a lien in favor of employés performing certain kinds of labor, and providing that such lien should not continue in force, unless a statement thereof is filed within 30 days, and an action is begun within 3 months. The lien was created by the statute, and not by the acts of filing and bringing suit which merely preserve or keep it in force. Certain of the claimants had prior to the institution of the bankruptcy proceedings filed statements and brought suits within the prescribed time, and certain others had not done so. It was held that the former were entitled to preference, and the latter were not. In the Emslie Case the lien involved was one under the mechanic's lien law of New York, the peculiarity of whose law is in providing that the lien shall not attach until the filing of the notice. There the notice had been filed within the prescribed time prior to the institution of the bankruptcy proceeding. It was held that the notice was defective, and therefore claimant was not entitled to the preference, but that if it had not been defective he would have been entitled thereto. In the Laird Case the lien involved was one under an Ohio statute providing that, in all cases where the property of an employer is placed in the hands of an assignee, receiver, or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver, or trustee is appointed shall be first paid out of the trust fund in preference to all other claims against such employer, except claims for taxes and costs of administering the trust. In that case the property of the bankrupt had been placed in the hands of a receiver prior to the institution of the bankruptcy proceedings. It was held that the nature of the right of a laborer under this statute was a lien, and that the laborer claimants therein were entitled to preference. These cases involved problems of their own. One was as to the basis on which such perfected liens are entitled to preference in bankruptcy; and another was as to whether such liens were affected by the provisions of sections 67e and 67f of the bankrupt act annulling liens and incumbrances. It was held that they were not affected thereby. They did not involve any of the problems with which we have to do here, and hence it is that I have treated them as not relevant to any of the questions herein involved.

2. Another ground upon which it is urged on behalf of the trustee and contesting creditors that claimants are not entitled to preference is that their rights are affected by said provisions of the bankrupt act just referred to, to wit sections 67e and 67f. This position is really inconsistent with the foregoing one. Said provisions invalidate certain liens and incumbrances. The position that they affect claimants' rights herein presupposes that they

Digitized by Google

have liens to be affected; whereas, the former position is based upon the supposition that claimants do not have any liens, as none of the contingencies upon the happening of which liens are to attach have happened in this case. This supposition I have conceded to be correct, and being so it necessarily follows that the claimants' rights are in no wise affected by said provisions of the bankrupt act. If the liens in the Kerby Denis Co., Emslie, and Laird Cases, as held therein, were not affected by said provisions, it is hard to make out that claimants' rights, which were not liens at all, were affected thereby.

3. A third ground upon which it is so urged is that claimants, to preserve their rights, should have filed in the clerk's office of the county in which the materials were furnished a certain verified statement in writing within 60 days after the last day of the last month in which the materials were furnished, and they failed so to do. It is maintained that the state statute required the filing of such statement within such time. Of course, if the state statute so required, the failure to comply with it is fatal to claimants' rights. No such requirement is found in any of the statutory provisions heretofore considered. If it exists at all, it is to be found in section 2494, one of the succeeding sections in the same article as those provisions. Said section is in these words: "No lien provided for in this article shall attach unless the person who performs or furnishes the labor or teams shall, within sixty days after the last day of the last month in which any labor was performed or materials or team were furnished file in the county clerk's office of each county in which the labor was performed or materials or teams were furnished a statement in writing, verified by affidavit setting forth the amount due therefor, and for which the lien is claimed, and the name of the canal, railroad, turnpike or other public improvement upon which it is claimed. Said claim shall be filed and indorsed by the clerk of the court giving the date of the filing. The clerk shall also make an abstract and entry thereof as now provided by law in case of mechanics' liens, and in the same book used for that purpose, and shall make proper index thereof. For his services the clerk shall be paid one dollar by the party filing the claim, which may be recovered by him as costs from the party against whom the claim is filed."

In order to determine the applicability of this section to the case in hand it is essential to understand the two preceding sections, to wit, sections 2492 and 2493, which intervene between it and those heretofore considered and the immediately succeeding section, to wit, section 2495, all of which are in the same article. It will be helpful also to note the provisions of the concluding sections of the article, to wit, sections 2496, 2497, 2498, 2499, so that in viewing the question now under consideration we may be, as it were, on top of the entire article.

By section 2492 it is provided that all persons who perform or furnish labor, material, supplies, or teams for the construction or improvement of any canal, railroad, turnpike, or other public improvement in this commonwealth by contract, expressed or implied, with the owner or owners thereof, or by subcontract thereunder, shall have a lien thereon and upon all of the property and franchise of the owner or owners thereof for the full contract price of such labor, material, supplies, and teams so furnished or performed, which said lien shall be prior and superior to all other liens thereafter created thereon. It is further provided therein that any person undertaking or expecting to perform or furnish labor, material, supplies, or teams may acquire a lien therefor by filing in the clerk's office of each county wherein he shall have so undertaken to perform or furnish labor, material, supplies, or teams, a statement in writing stating that he has so undertaken and expects to perform or furnish labor, material, supplies, or teams, and the price at which the same is to be furnished, and the lien for labor performed, materials, supplies, or teams furnished thereafter shall relate back and take effect from the filing of such statement. It was still further provided therein that as to all original construction such lien shall be prior to all liens theretofore or thereafter created on the part so constructed and no other part. The section as it stood originally contained neither of the last two provisions stated. They were added by an amendment of date March 21, 1896. It will be noted that the lien thus provided for is like the lien provided for in section 2487 and the

Digitized by Google

succeeding sections relating thereto, in that it relates to a canal, railroad, turnpike, or other public improvement, but differs therefrom, in that it does not also relate to a mine, rolling mill, foundry, or other manufacturing establishment; that the lien is not contingent on the happening of certain events, but attaches at once on the performance of the labor or furnishing of the materials, supplies, or teams; that it applies to subcontractors as well as contractors, and supplies and teams as well as labor and materials; that it covers all the property of the debtor, instead of being limited to the property and effects involved in the business, and all the accessories connected therewith; and that as amended, upon due compliance with the provisions of the amendment, it does not simply attach at the time of the performance of the labor or furnishing of the material, supplies, or teams, but relates back to the time of the undertaking so to do, and takes precedence not only of all liens thereafter created, but in case of original construction in every instance of all liens theretofore created on the part so constructed. This recital of the difference between the two liens is sufficient to indicate that these differences are quite marked and distinct.

By section 2493 it is provided that the liens provided for "in the foregoing section" should in no case be for a greater amount in the aggregate than the contract price of the original contractor, and should the aggregate amount of liens exceed the price agreed upon between the original contractor and the owner or owners of the canal, railroad, turnpike, or other improvement, then there should be a pro rata distribution of the original price among said lien-holders.

Section 2495 is in these words: "Liens acquired under this article shall be enforced by proper proceedings in equity, to which other lien-holders must be made parties, but such proceedings must be begun within one year from the filing of the claims in the county clerk's office as herein provided."

Then, as to the concluding sections of the article, to wit, sections 2496 to 2499, inclusive: By section 2496 it is provided that in a written contract for the sale of railroad equipment or rolling stock, deliverable immediately or subsequently at stipulated periods by the terms of which the purchase money in whole or in part is to be paid in the future, it may be agreed that the title to the property sold or contracted to be sold shall not pass to or vest in the vendee until the purchase money shall have been fully paid, or that the vendor shall have and retain a lien thereon for the unpaid purchase money, notwithstanding delivery thereof to the vendee; but the terms of credit should not exceed 25 years. It was further provided therein that such agreement should not be valid as against subsequent purchasers for value without notice or against creditors until acknowledged or proved, as deeds of trust and mortgages are required to be, and lodged for record in the office of the Secretary of State, where they should be recorded. By section 2497 provision is made for a conditional sale of such property in a contract of leasing and renting, the rentals as paid to be treated as purchase money and the title not to vest in the lessee, notwithstanding the delivery of the property to him, until the purchase money is paid in full, "subject, however, to the provisions contained in section 2495." By section 2498 provision is made for the release of the lien provided for in section 2496 and assignment of the obligations secured thereby. Section 2499 is in these words: "On each locomotive or car that may be sold or leased in accordance with the provisions of this article, the name of the vendor or lessor shall be distinctly marked, followed by the word 'owner' or 'lessor' as the case may be."

Sections 2487 to 2491, inclusive, are not original legislation. They are reenactments of former legislation. They were originally enacted substantially as they are contained in said article by the act of March 20, 1876 (1 Sess. Acts 1875–76, p. 115, c. 902). The only differences are that said act only related to railroad companies and the owners or operators of rolling mill, foundry, or other manufacturing establishment; that it contained a section giving a like lien to all persons whose property should have been injured by the carelessness of a railroad company or its employés for the damages sustained; and that it provided for an independent suit for the enforcement of the lien in case the lien attached because of the happening of one of the contingencies which are set forth in section 2490 of Kentucky Statutes of 1903. It con-

Digitized by Google

tained no provision for the bringing of such a suit in case the lien attached because of the happening of any of the contingencies set forth in section 2487. It evidently contemplated that in such case no suit was needed, as the happening of any said contingencies put the property and effects covered by the lien in process of distribution amongst creditors, and all that was needed was for the claimant to assert his lien before the person or court having charge of the distribution by filing his claim with him or it, and no limit was provided in which he should do this. The limit as to time of assertion of the lien had relation solely to where it was necessary to assert it by an independent suit. By an act of March 4, 1880 (1 Sess. Acts 1879–80, p. 165, c. 1382), the foregoing act was amended by cutting the right of the materialman to any lien for materials or supplies furnished to any rolling mill foundry, or other manufacturing establishment, and the lien of laboring men in rolling mills, foundries, or other manufacturing establishments for wages down to wages due within 60 days before any assignment for any purpose as specified in the original act. The law in this particular thus remained until February 25, 1893.

Likewise, sections 2492 to 2495, inclusive, are not original legislation. They, too, are re-enactments of former legislation. They were originally enacted substantially as they are contained in said article save as section 2492 embodies the amendment of March 21, 1896, by the act of March, 1888 (1 Sess. Acts 1887–88, p. 99, c. 1271). Likewise sections 2496 to 2499, inclusive, are not original legislation. They, too are a re-enactment of former legislation. They were originally enacted substantially as they are contained in said article by the act of March 17, 1882 (1 Sess. Acts 1881–82, p. 43, c. 454). On the 25th day of February, 1893, the act entitled "As concerning liens" (Sess. Acts 1891–92–93, p. 505, c. 151), became a law. Article 3 of that act was made up of a combination of said three several acts. The act of March 21, 1876, was re-enacted substantially as it was originally, save that it was enlarged to take in a turnpike, canal, and other public improvement; the amendment of March 4, 1880, being abandoned. The acts of March, 1888, and March 17, 1882, were substantially re-enacted. The third article of this act of February 25, 1893, was thus made up of these three distinct and separate strata of legislation. The phraseology of the old legislation was but slightly changed in the re-enactment, and this act of February 25, 1893, constitutes chapter 79 of Kentucky Statutes of 1903, save as it embodies the amendments of March 21, 1896. Sections 25 to 29, inclusive, of the third article of that act, substantially the act of March 21, 1876, constitute sections 2487 to 2491 inclusive, of the third article of said chapter; sections 30 to 33 inclusive of the third article of that act, substantially the act of March, 1888, constitute sections 2492 to 2495, inclusive, of the third article of said chapter; and sections 34 to 37 inclusive, of the third article of that act, substantially the act of March 17, 1882, constitute sections 2496 to 2499, inclusive, of the third article of said chapter.

With this general survey of the sections of article 3 of chapter 79 of the Kentucky Statutes of 1903, and their history we are in position to approach the question now under consideration. That question is the contention of counsel on behalf of the trustee and contesting creditors that section 2494 has application to a lien asserted under sections 2487 to 2491, inclusive, and that by reason of claimant's failure to comply with said section they are not entitled to the preference claimed. The sole basis of the contention is that in section 2494 it is said that "no lien provided for in this article" shall attach unless a statement is filed as provided therein. The lien provided for by sections 2487 to 2491 is one provided for by said article. Hence it is urged that by the very terms of section 2494 its provisions apply to such lien. But to confine one's self to these words is to stick in the bark. The thing to be determined is the intent of the Legislature, and to determine this the whole article and the history of the legislation it embodies is to be looked at. Prior to the act of February 25, 1893, as the legislation embodied in the first group of sections, to wit, sections 2487 to 2491, inclusive, stood, there was no requirement that a statement be filed in the county clerk's office to preserve the lien provided by it. If that act and the Kentucky Statutes contain such a requirement in section 32 of the one and 2494 of the other it is an innovation.

Digitized by Google

Never before in the history of this particular legislation was any such requirement made.

Again, the 13 sections constituting article 3 of chapter 79 of Kentucky Statutes of 1903 fall into three separate and distinct groups in accordance with the legislation as it stood prior thereto. Sections 2487 to 2491, inclusive, constitute the first group and represent the act of March 21, 1876. Sections 2494 to 2495, inclusive, constitute the second group and represent the act of March, 1888. And sections 2496 to 2499 constitute the third group and represent the act of March 17, 1882. The first section of each group is the leading section thereof; 2487 of the first group, 2493 of the second, and 2496 of the third. The other sections of the first group relate to its leading section, and likewise the other sections of the third group relate to its leading section. None of the subordinate sections of the third group relate to sections of the other two groups; nor does any of the subordinate sections of the third group relate to any section of the other two groups. Apparently this is not so. In section 2497 occur the words "subject, however, to the provisos contained in section 2495," which we have quoted above. In the act of February, 1893, the words are "subject, however, to the provisos contained in section 33." But evidently this is a pure mistake. The reference in the one instance is to section 2496, and in the other to section 34, the leading section of the third group. In the act of March 17, 1882, the original legislation, the words are "subject, however, to the provisions contained in section one of this act." Section 1 of that act is section 34 of the act of February 25, 1893, or section 2496 of Kentucky Statutes of 1903, the leading section of the third group. If, then, section 2494, a subordinate section of the second group, relates to any other section of the third article than its own leading section, it does that which none of the other subordinate sections of the other two groups does. It breaks the symmetry of the arrangement.

Again, the only reason for holding that section 2494 does relate to any other section than the leading section of its own group is because of the phraseology "no lien provided for in this article"; but that phraseology requires one to relate the section to the lien provided for in the leading section of the third group, as well as to the lien provided for in the first group. Yet one would hardly contend that it has any relation to the former lien.

Again, similar phraseology in other sections of the article do not have and cannot be given any such wide effect. In that portion of section 2491 which contains the limitation as to time in which suit is to be brought or claims filed, we have these words: "Suit must be filed to enforce the lien given by this article within sixty days from the date of the assignment or from the date when the property shall go into the hands of a receiver or trustee or from the date when the business shall be stopped or suspended or the property sold, or the claims for which a lien is asserted must be filed in said time with the person authorized to receive and report claims." Of course, "the lien given by this article" is more definite than "no lien provided for in this article"; but those words indicate that the draftsman at the time was thinking of the article as providing for a single lien, and that the lien provided for in section 2487. That he was still thinking of the article as providing a single lien, and that the lien provided for in section 2492, would account for his using the words "no lien provided for in this article," when no reference was intended to be had to any other lien than that provided for in section 2492. It is also true that the words used in section 2491 in describing the event from which the 60 days is to be counted show that reference is had to the lien provided for in section 2487, and not to either of the other two liens provided for in said article. But, as we shall see, there are other words used in section 2494 which show that reference is had to the lien provided for in section 2492, and in none other.

Then, in section 2495, we have these words: "Liens acquired under this article shall be enforced by proper proceedings in equity, to which the other lienholders must be made parties, but such proceedings must be begun within one year from the filing of the claim in the county clerk's office, as herein provided." Now, whilst the language here used is general, "liens acquired under this article," it is certain that reference is had solely to liens acquired under section 2492, the leading section of the group to which section 2495 be-

Digitized by Google

longs as a subordinate section. It can have no reference to liens under section 2487. All the liens provided for thereby do not have to be enforced by proper proceedings in equity. It is only when the liens attach because of the happening of the contingencies set forth in section 2490 that they have to be so enforced. When they attach because of the contingencies set forth in section 2487, all that is necessary to do is to file the claims with the person authorized to receive and report claims, as provided in section 2491. Said language can have no reference to liens under section 2487, for the additional reason that the limitation prescribed in section 2495 can have no reference thereto. This because section 2491 prescribes the limitations applicable to liens under section 2487; and, further, inasmuch as liens under section 2487 do not attach at all before the happening of one of the contingencies set forth in sections 2487 and 2490, it could not have been intended to provide that proceedings to enforce them should be brought before they came into existence.

Then, in section 2499, we have these words: "On each locomotive or car that may be sold or leased in accordance with the provisions of this article, the name of the vendor or lessor shall be distinctly marked, followed by the word 'owner' or 'lessor' as the case may be." Here the words "in accordance with the provisions of this article" can have reference solely to sections 2496 and 2497 of the group to which section 2499 belongs, and yet this broad language is used as if it might have reference to provisions in the other groups.

There are, then, four instances in the article where the word "article" is used. In three of them it has reference to the group of sections in which it occurs, and to no other group. Is it not reasonable to conclude that in the other or fourth instance it has no wider scope? Where the word "article" occurs in sections 2494 and 2495 it is in substitution for the word "act" in the act of March, 1888. Of course, there it has sole reference to the lien provided for in section 2492. So where the word "article" occurs in section 2499 it is a substitution for the word "act" in the act of March 17, 1882. The phraseology in section 2491, where the word "article" occurs, is new, and hence it is not used in substitution for anything in the original legislation.

Again, as heretofore indicated, other phraseology in section 2494 shows that the requirement of that section, notwithstanding that relied on, has reference solely to the lien provided for in section 2492, and can have no relation to that provided for in section 2487. It is that used in providing what the statement required to be filed shall contain. Amongst other things, it is provided that it shall contain "the name of the canal, railroad, turnpike or other public improvement upon which it [the lien] is claimed." The lien provided for in section 2492 is limited to persons who perform labor or furnish materials, supplies, or teams for the construction or improvement "of any canal, railroad, turnpike, or other public improvement in this commonwealth"; whereas, the lien provided for in section 2487 takes in also persons who perform labor for or furnish material to any mine or owner or operator of any rolling mill, foundry, or other manufacturing establishment. The provision of section 2494 in regard to the statement to be filed does not contemplate that said section has any application to a mine, rolling mill, foundry, or other manufacturing establishment.

And, finally, the provisions of section 2494 in regard to the filing of a statement would not seem to be germane to the lien provided for in section 2487. We must bear in mind the position taken at the outset as to the character of lien provided for in that section. It is a contingent lien, and the contingency in each instance is one over whose happening the employé or materialman has no control whatever. The happening thereof depends upon the action of the debtor or of his creditors. No other action brings it into existence. It is something that he or they do that has this effect. Now the rule, at least in statutes as to mechanics' liens and liens of a similar character where provision is made for the filing of a notice or statement, is for the lien to come into existence upon the creation of the debt, or, at the farthest, as in New York, upon the filing of the notice or statement; the failure to file same, when the lien comes into existence at the creation of the debt, forfeiting the lien. In the one instance, the filing of the notice or statement preserves the lien; in the other, creates it. It is the creation of the debt or the filing of the notice or statement by the employé or materialman which calls the lien into

Digitized by Google

existence, and invariably a provision as to filing a notice or statement in such cases is followed by a provision as to bringing suit within a certain short period of time to enforce the lien. Here, if section 2494 has application to the lien provided for in section 2487, it neither preserves nor creates the lien. It is simply a limitation upon the effect of the happening of the contingencies, and this when section 2487 contains no intimation of a limitation therein, and it has a different bearing on the lien provided for in section 2492 from what it has on that provided for in section 2487. In the former section it preserves the lien which comes into existence with the creation of the debt. Nor is there any provision as to bringing suit within a certain short period of time after the filing of the notice or statement when the lien arises under section 2487.

The limit prescribed by section 2495 has reference solely to when it arises under section 2492. Under section 2487 the lien may attach at any period of time after the creation of the debt short of the time when the debt is barred by the statute of limitation. Why prescribe that the notice or statement be filed within the short period of 60 days after the last day of the last month in which labor was performed or materials furnished, and yet allow the lien to be asserted within 5 years, and even within 15 years if a note is taken, after the debt is due? Of what value is the notice after the lapse of any great period of time? Is it of any more value than the statute and the nature of the business being carried on? If there is any severity of hardship in the lien provided for in section 2487, it is in its character, and not in the absence of a provision as to filing a notice or statement. It is said that the lien provided for in section 2487 is an anomaly, in that no other state has a similar statute. If so, and such would seem to be the case, no argument can be drawn from the uniform requirement of filing notice or statement in ordinary mechanic's lien statutes that it was intended to require such filing here, particularly when there is no requirement as to bringing suit within a period of time after the filing, which is also a uniform requirement in such statutes. The requirement as to filing a notice or statement seems out of place as to a lien of this anomalous character.

It is true, as suggested, that an examination of chapter 79 shows that the framers thereof knew the distinction between the meaning of the words "section" and "article," for they at times use the one word and at other times the other word. As, for instance, in the first article section 2468 says, "the liens mentioned in the preceding section," and section 2477 says, "the liens declared in this article," and in the second article section 2482 says, "the lien given in section 2480 and the liability mentioned in section 2481 of this article," and section 2485 says, "all persons having liens under this article," and section 2486, "the lien given by this article." But it is to be noted that the first article relates to but one kind of liens, to wit, the ordinary mechanic and materialmen's liens, and that the second article relates to but one kind of liens, to wit, watercraft liens. Neither article relates to more than one kind of liens, as does the third article, which relates, as shown, to three distinct kinds of liens. Where, then, in the first and second articles, the words "liens declared in this article" or "liens under this article" are used, they have reference and can have reference, to but one kind of liens; and where in the third article the words "lien given by this article" are used in section 2491, belonging to the first group of sections, the words "in accordance with the provisions of this article" are used in section 2499, belonging to the third group of sections, and the words "lien acquired under this article" are used in section 2495, belonging to the second group of sections, reference is had, and can be had, to but one kind of liens, to wit, the kind to which the group in which the words occur belong. And yet it is contended that the words "no lien provided for in this article," in section 2494, belonging to the second group of sections, have a wider significance than substantially the same words in the first and second articles in the first and third groups of the third article and in the second group thereof, the same group in which they occur, have; and in giving them the wider significance, all the liens in the article are not taken in, but they are limited to the liens covered by the first group, leaving out those covered by the third. Limiting the words in question to liens of a single kind and those covered by the second group of sections in which they

Digitized by Google

occur is but giving them the same significance that is given to substantially the same words wherever they occur throughout the chapter.

It is true also, as suggested, that in section 2493 the words used are "the liens provided for in the foregoing section"; whereas, in section 2494 the words used are "no lien provided for in this article." This is accounted for by the fact that section 2493 contains the same words as are contained in the original act of March, 1888. Where the latter words occur therein, are these words, "no lien provided for in this act." In making the revision or re-enactment some substitute for the word "act" had to be found, and the word "article" was used without intending to give the words any wider scope in the revision and re-enactment than that they had in the original act. If at the time the framers were thinking of the article as containing but one kind of liens, to wit, that covered by the second group of sections, the word "article" was the proper word to use in the substitution for the word "act." Of course, this view of the matter attributes to the framers thoughtlessness or carelessness. But it is conceded that in framing section 2494 they were thoughtless or careless. The only question is where the thoughtlessness or carelessness comes in. Counsel for the trustee and the contesting creditors would fix it in that portion thereof relating to the character of the statement to be filed and exclude it from the words in question. Not a single consideration occurs to me for so locating it. The numerous considerations heretofore set forth combine to locate it in the words in question. No greater significance can be given to section 2494 than if it had read "no lien shall attach," etc., leaving out the words "provided in this article."

In that case there would be no room for claiming that the section had relation to any other liens than those covered by section 2492. The words "provided for in this article," etc., therefore, are mere surplusage and without legal signification. I conclude, therefore, that this ground is not well taken.

4. A fourth ground upon which it is urged that one of the claimants is not entitled to a preference as to a portion of its claim is that it accepted personal security therefor, and thereby waived its right to a lien under the statute. The material furnished by the claimant Hiram Blow & Co. was furnished on 18 different dates between and including January 1, 1905, and February 9, 1905. The whole amount furnished came to $12,219.59, upon which $348.93 has been paid, leaving a balance due of $11,870.66. Between and including April 26, 1905, and July 19, 1905, the bankrupt on account of this indebtedness executed to said claimant 10 separate notes in different amounts, payable at Richmond National Bank, Richmond, Ky., from 30 to 60 days after date, upon all of which, except two, certain Humes connected with and interested in the bankrupt were sureties. The notes were all negotiated to certain banks, and upon nonpayment at maturity were taken up by the claimant. The contention is that the claimant Hiram Blow & Co., by taking these notes with sureties subsequent to the furnishing of the material and creation of the indebtedness therefor and the acquisition of the right to the contingent lien, waived its right thereto. In support of this contention, 19 Am. & Eng. Enc. of Law, p. 30, and Jones on Liens, vol. 2, § 1519, are cited. The statement as to the law on the subject by the former is in these words: "The prevailing doctrine as to vendors and mechanics' liens seems to be that the taking of the note of a third person or the debtor's note or bond with surety or negotiable note drawn by a third person and indorsed by the debtor is presumptively a waiver of the lien. This presumption may, however, be rebutted by parol evidence that it was not the intention of the parties that the lien should be divested." The statement by the latter is in these words: "A lien is waived by taking collateral security for the debt which by operation of the statute might be secured by the lien. This is upon the idea that the taking of full security is inconsistent with the idea of there being a mechanic's lien upon the land for the same debt, or, in other words, the taking of such security shows an intention to waive the security afforded by the statutory lien. It is immaterial what such security be, if it only be distinct security. It may be a mortgage on the same or other property; or a pledge or obligation of a third person; or a chattel mortgage, a guaranty, or an indorsed note." A further statement of Jones on Liens, vol. 2, § 152, is relied on by counsel for claimant. It is in these words: "That there are authorities which hold that

Digitized by Google

the taking of security does not of itself show an intention to waive a mechanic's lien, and that it is not waived unless the security is inconsistent with the lien. In conformity with this view, the taking of security in the form of promissory notes of third persons has been held not to discharge the lien unless the notes are expressly received in payment, and the burden of proof is upon the debtor to show by direct and positive proof that the creditor agreed so to receive them."

The point at issue seems to be whether the taking of other security for the indebtedness is presumptive evidence of a waiver of the lien or right thereto. It is not claimed that in and of itself it amounts to a waiver. According to one line of authorities, it is presumptive evidence thereof, and the burden is on the mechanic or materialman to show by relevant evidence that it was not in fact waived; and, according to the other, it is not such evidence, and the burden is on the debtor to show that in fact it was waived. I do not deem it essential to carefully examine the relevant decisions and determine on which side of the question is the weight of authority. I have an idea that such an examination thereof will disclose that the weight of authority is in favor of the position that the acceptance of personal security for his indebtedness by a mechanic or materialman is not presumptive evidence of a waiver of his lien or right thereto. In determining this question, cases involving mortgages or liens accepted by mechanic or materialman on the same or other property should be put to one side. These cases involve an element not present in cases involving personal security, merely, and that element is estopped. Howe v. Kindred, 42 Minn. 433, 44 N. W. 311. Judge Collins said: "The reason usually given in the adjudicated cases for holding that a mechanic or materialman has lost his lien by taking security either upon the property to which the lien attaches or upon other property is that subsequent lienholders and purchasers have the right to rely upon the record and should be protected against secret liens."

Possibly, also, cases involving vendors' liens should be put to one side. The vendor's lien is a creature of equity, and the same rule may not be applicable to a mechanic or materialman's lien, which is a creature of statute, as is applicable to the former. The reason why I do not deem it essential to make such examination or determination is that I think that it must be held that in Kentucky the rule is that acceptance of personal security by a mechanic or materialman is not presumptive evidence of a waiver of his lien or right thereto.

In the case of Smith v. Well's Adm'x, 4 Bush (Ky.) 92, it was held that a landlord does not waive his exclusive lien for rent upon the tenant's property, which is a creature of statute, by taking personal security for the rent. Judge Hardin said: "The second ground on which a reversal is sought involves the inquiry whether Middleton did or not, in taking personal security for the rent, waive his lien on the tenant's property; and, if he did not so waive his lien, whether the appellant, in consequence of his suretyship as the assignee of Middleton, had a claim on the property of W. W. Smith which should have been preferred to that acquired by the levy of the appellant's execution. By the provisions of the Revised Statutes of 1852 in relation to landlord and tenants, as amended in 1858 (2 Stanton, p. 99) it is provided that a landlord shall have an exclusive lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant or under tenant, found upon the rented premises, after possession is taken under the lease. Although it has been held under particular circumstances that a vendor may waive his lien for the purchase money by the acceptance of other security, the principle of such decisions is not, we think applicable to this case. There is nothing in the acceptance of personal security inconsistent with the lien conferred by the statute in a case like this, where there is no evidence of an intention to treat the original claim as discharged by the acceptance of any mere obligation or the creation of a new debt; and it seems to us that a lien existed for the rent, although other security was taken."

Of course, if such is the law as to the landlord's statutory lien, it is also the law as to the mechanic or materialman's statutory lien, and evidence that such is the law in the latter case may be found in the statute itself. A statute

Digitized by Google

creating the ordinary mechanic and materialman's lien was passed in this state as early as ———, and remained a law on the subject until said act of February 25, 1893 (Laws 1893, p. 505, c. 151), entitled "An act concerning liens," became a law, when it was substantially re-enacted as article 1 of that act. It contained an express provision that the liens created thereby should not have effect if security should be taken for the labor performed or materials furnished. As the provision stood in chapter 70 of the General Statutes of Kentucky, it was in these words: "Nor shall the liens authorized by this chapter have effect if security shall have been taken for the labor performed or material furnished." That chapter had relation solely to the ordinary mechanic or materialman's lien. It did not include the liens covered by the acts of March 21, 1876, March 17, 1882, and March, 1888, hereinbefore referred to. The provision as to the effect of taking security being limited to liens authorized by said chapter 70, it had no relation to the liens covered by said other acts. The effect of taking security upon the liens covered thereby was left open to be determined by the principles of the common law. The act of February 25, 1893, entitled, "An act concerning liens," combined all of said liens into one act; article 1 thereof covering the ordinary mechanic and materialman's liens, and article 3 covering said other three kinds of liens created by said several acts as hereinbefore set forth. It also combined therewith what are called watercraft liens covered by article 2, livery stable keepers' and registers' liens covered by article 4, and keeper of jacks, stallions, and bulls' liens covered by article 5. The language of the former chapter 70 of the General Statutes in regard to the effect of taking security was carried forward into article 1 of said act of February 25, 1893, exactly as it stood there, so that the liens to be affected by the taking of security was still as it had been, "liens authorized by this chapter." There it could only have relation to the ordinary mechanic and materialman's liens, because they were all the liens covered by chapter 70 of the General Statutes. The act of February 25, 1893, was not a chapter. It was merely an act. When it became incorporated in the Kentucky Statutes as a part thereof, it became a chapter, to wit, chapter 79. The act and chapter being a combination and re-enactment of a number of older acts substantially as they stood formerly, it is questionable whether it was intended that the provision as to the effect of taking personal security should have a wider scope than it had theretofore had. I have reached the conclusion that the word "article," where it is used in article 3 in substitution for the word "act" in the former acts, was not intended to give the provision where it occurs wider scope than it formerly had. It is assumed by counsel on both sides herein that said provision as to the effect of taking security had application to liens under article 3. I do not find it necessary to determine this matter. Possibly it did have such application; but, whether so or not, it has had no application since the amendment of March 21, 1896, for by said amendment said provision was repealed, and there has been since then no such statute as to any of the liens covered by chapter 79 of Kentucky Statutes.

The evidence then in the statute itself to which allusion has been made of the fact that in Kentucky the taking of personal security is not a presumptive evidence of a waiver of the mechanic or materialman's statutory lien is the provision referred to as to the effect of taking such security. It would hardly have been enacted if it had not been the law that otherwise the taking of security was not presumptive evidence of such a waiver: but, however this may be, it must be accepted that the repeal of the provision is evidence of legislative intent that the liens created by the statute should no longer be affected by the taking of security. This is not the case of a repeal of a statute covering a certain subject in toto. It is simply a repeal of a particular provision in a statute covering a certain subject. The statute as it stood with that provision enacted that the liens covered by it should be affected by the taking of security. Its repeal was as much as to say that it should not be so affected.

It is urged on behalf of claimants that, assuming that its taking personal security is presumptive evidence of waiver, and the burden is on it to show that it was not intended to waive the lien thereby, it has rebutted that presumption and shown that there was no such intention. The evidence consists of the affidavits of one of the partners in Hiram Blow & Co. and its general

Digitized by Google

manager to the effect that there was no intention on the part of said claimant to waive its lien and that the personal security was taken as additional security. I doubt whether this is sufficient evidence of intention in case the taking of personal security is presumptive evidence of waiver, or the burden is on claimant to show that it was not intended to waive the lien. I am inclined to think that in such a case some facts must be shown from which it would be legitimate to infer that there was no such intention. But for the reasons heretofore stated I conclude that this ground is not well taken.

5. A fifth and final ground upon which the trustee and contesting creditors base the contention which they have put forward is that the claimant holds as assignee the claims which it has asserted. As to the claim referred to for a balance of $11,870.66, the claimant was the original creditor. It furnished the material that gave rise to that indebtedness, and for it, as heretofore stated, it received the bankrupt's 10 different notes, which notes it negotiated to certain banks, and upon their nonpayment took up. It is therefore claimed that it holds said indebtedness as assignee, and not as originally. The other claim which it holds amounts to the sum of $2,870.63 and is on account of staves sold and delivered by Hubbard Bros. on four separate dates between and including May 25, 1905, and July 1, 1905. A note was given by the bankrupt to said Hubbard Bros. for $1,375, covering the amount of the last sale, and this note and amounts due on account of other three sales were duly assigned to the claimant, and it asserts the whole of said indebtedness as assignee of Hubbard Bros.

The position is taken that an assignee of a materialman is not entitled to the contingent lien created by the statute in question, and that upon the happening of any of the prescribed contingencies it will not attach in his favor. The general rule, no doubt, is that the assignment of an indebtedness carries with it any security it has. This is particularly true of indebtedness secured by a mortgage or vendor's lien. It is also true of the indebtedness against a railroad company which a court of chancery will favor to the extent of giving it a preference when the railroad is placed in the hands of a receiver. An assignee of such indebtedness will be given such preference as much as the original holder thereof. Trust Co. v. Walker, 107 U. S. 596, 2 Sup. Ct. 299, 27 L. Ed. 490; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; Northern Pac. R. Co. v. Lamont, 69 Fed. 73, 16 C. C. A. 364; Columbus S. & H. R. Co. Appeals, 109 Fed. 177, 48 C. C. A. 275. In the Walker Case, Mr. Chief Justice Chase said: "This case differs from that of Union Trust Company against Souther only in the fact that Walker, the present intervener and appellee, is the assignee by purchase from the original holders of the claims, which he seeks to have paid and one of the questions arising is whether, being an assignee, and not an original holder, he is entitled to payment. We have no hesitation in answering this question in the affirmative. As we have said in Fosdick v. Schall, 99 U. S. 253, 25 L. Ed. 339, these creditors are paid, not because in law they have a lien on the mortgaged property or income, but because in equity the earnings of the company constitute a fund for the payment of the expenses which their claims represent before any income arises which ought to be applied to the discharge of the mortgage debt. Under such circumstances, it is a matter of no importance that the original creditor has parted with the claim. The right is one that attaches to the debt, and not to the person of the original creditor. Consequently the right passes with an assignment of the debt." In the Lamont Case, Judge Caldwell said: "The right of preference is one that attaches to the debt and not to the person of the original creditor. Consequently the right passes to an assignee of the debt." And, in the Columbus S. & H. R. Co. Appeals Case, Judge Lurton said: "The third assignment of error in case No. 862, being the appeal of John P. McCune, trustee, should be sustained so far as to place McCune as the assignee labor claims upon the footing of the original parties. The preference attaching to a labor claim is to the claim, and not to the claimant, and passes with the claim to an assignee."

But what we have to do with here is an indebtedness secured by a statutory lien or right of priority. The question has arisen under the bankrupt act as to whether an assignee is entitled to the priority given by section 64b(4) to wages due to workmen, clerks, or servants. It has been held that he is not in the following cases, to wit: In re Westlund (D. C.) 99 Fed. 399;

Digitized by Google

In re North Carolina Car Co. (D. C.) 127 Fed. 178. The following authorities state the law as there laid down: Loveland on Bankruptcy, 726; Brandenburg on Bankruptcy, 1043; Collier on Bankruptcy, 503; 5 Cyc. 586. It has been held that he is entitled to the priority so given in the following cases, to wit: In re Brown, Fed. Cas. No. 1,974; In re C. P. Harmon (D. C.) 128 Fed. 170. The Sixth Circuit Court of Appeals has had the question before it in the case of Shropshire, Woodliff & Co. v. Bush et al., from the District Court of the Eastern District of Tennessee. Judge Clarke of that court held that the assignee is not entitled to the priority, and the Sixth Circuit Court of Appeals at its July session, 1906, certified the question to the Supreme Court of the United States for decision. 27 Sup. Ct. 178, 204 U. S. 186, 51 L. Ed. 436. In the case of In re Campbell (D. C.) 102 Fed. 686, it was held that the right to priority might be assigned after the filing of the petition in bankruptcy.

The decisions as to whether the assignee in such instance is entitled to the priority are hardly relevant to the question here. Those as to whether the assignee of a laborer or materialman is entitled to the lien conferred by a mechanic's lien or similar statute are more in point, if not decisively so. Mr. Freeman, in his note in Kinney v. Duluth Ore Co., 49 Am. St. Rep. 530, thus states the condition of the decisions on this subject in one particular: "Perfected Liens. Although there is a direct conflict in the adjudicated cases on the subject, the great weight of authority, as well as the better reasoning, is in favor of the rule that a perfected mechanic's lien may be assigned, and the assignee may thereafter enforce it in his own name, and in the same method that the assignor might have done." It has been so held by the Supreme Court of the United States in the case of Davis v. Bilsland, 18 Wall. 659, 21 L. Ed. 969. Mr. Justice Bradley there said: "The plaintiff assigns three errors: * * * Second, that the claim of a mechanic for a statutory lien cannot be enforced by an assignee by a suit in his own name. In answer to this objection it is sufficient to refer to the fourth section of the civil practice act of Montana, which provides that actions shall be prosecuted in the name of the real party in interest. McKillican has completed his claim by filing his lien before assigning it to the plaintiff. It was perfectly lawful for him to assign his claim. It was not against any principle of public policy to do so. When assigned, the claim really belonged to the plaintiff, and according to the Code he was the proper person to bring suit upon it."

Mr. Freeman in said note thus states the law on this subject in another particular: "Assignment of Right to Lien. On this topic also there is a conflict of authority, but the great majority of the cases maintain the proposition that the assignee of a claim for work and labor or material furnished cannot file the notice required by law and thereby create a lien. The right to create and perfect such lien is personal to the mechanic and cannot be assigned. Even in most of those jurisdictions where the perfected lien is capable of assignment the mere inchoate right to a mechanic's lien before the lien has been perfected by the filing of the claim is not assignable."

I regard the law as thus stated in both these particulars to be the better doctrine. The case we have here is not that of a perfect lien at the time of the assignment. It is that of a contingent lien, and attaches only upon the happening of certain contingencies; but its so attaching does not depend upon the doing of anything by the laborer or materialman which may be said to be personal to him. As we have heretofore held, there is no requirement as to his filing a statement or notice. It attaches upon the happening of certain contingencies over which he has no control and entirely independent of him. It comes, therefore, within the doctrine of the first line of decisions, and not within that of the other.

But it is claimed that we are affected here by two decisions of the Court of Appeals of Kentucky, to wit: Frailey v. Winchester, 96 Ky. 570, 29 S. W. 446; Hutsell v. Bank, 102 Ky. 410, 43 S. W. 469, 39 L. R. A. 403. In the former case it was held that the assignee of a laborer who was entitled to a lien under the act of March, 1888, now section 2492 of the Kentucky Statutes of 1903, cannot comply with section 3 thereof, now section 2494 of Kentucky Statutes of 1903, and thus preserve the lien. The laborer alone can comply therewith. Judge Paynter said: "The laborer not having done that which

Digitized by Google

the law required as a prerequisite to the attachment of a lien, no lien followed the debt into the hands of the Pryses. The lien being a statutory right, dependent upon a substantial compliance with its terms, no rule of equity can be invoked in this case to give that relief which a statute denies or fails to furnish." This case, therefore, comes within that line of cases laying down the law as set forth by Mr. Freeman in the second particular above. It is not applicable here, because the statute in question here does not require the filing of a statement or notice by the laborer or materialman, as heretofore held. In the latter case it was held that the assignee of a rent note could not collect it by what is called the "extraordinary remedy" of distress. This was so held because the remedy by distress can be exercised only by the holder of the reversion. This case, therefore, is not in point here.

It must be held, therefore, that the assignee of a laborer or materialman is entitled to the contingent lien created by the statute in question. If so, there is the greater reason that the claimants should be entitled to that lien as to the larger claim asserted by it. As to such claim, it was the original materialman. It simply negotiated the notes which it received for its claim, becoming bound as assignor to see to their payment, and upon their nonpayment it took them up and reinstated itself in the ownership of the claim. It was held by the Court of Appeals of Kentucky, in the case of Graham v. Holt, 4 B. Mon. 61, under the ordinary mechanic's lien law, which then contained the clause that the taking of security would amount to a waiver of the lien, that a mechanic who had so negotiated notes taken for his claim and regained them was entitled to his lien. Judge Marshall said: "It is contended, however, that the statute gives the lien to the mechanics and materialmen only, and that it is destroyed by the assignment of a note for the debt which it was intended to secure. We do not concede this to be a legitimate conclusion from the premises stated, nor from the additional fact that the statute provides only for the enforcement of the lien by those persons to whom it is given. The question is not to whom the lien belongs, or by whom it may be asserted in case the debt is assigned, but whether it passes wholly to the assignee, so as that he may enforce it without even making the original creditor a party, which, however, we suppose should not be allowed, or whether a beneficial interest in it passes, to be enforced in the name or with the assent of the original creditor as a party, or whether it remains wholly in the original party, who still continues responsible for the debt, and is to be enforced only when by again becoming the holder of the note he is again the creditor. The statute gives an express lien for the benefit of the mechanics and materialmen referred to. It nowhere says, however, that it shall not be assignable, or that it shall be destroyed by the assignment of the debt which it is intended to secure. Were it conceded, then, that in consequence of the particular mode pointed out for its enforcement it does not, as other express liens do, pass absolutely to the assignee of the debt, it would be depriving the statute of the beneficial operation it was intended to have to give it such construction as would prevent the mechanic or materialman from using according to the exigencies of his business, the debt, for the security of which the lien is given, but at the peril of losing the security. The statute did not intend to prohibit the taking of a note, nor to restrict the use of it, nor, as we think, to make the destruction of the lien the consequence of the transfer of the debt. If, then, it does not pass to the assignee it remains with the payee as ultimate security for the debt for which he generally becomes responsible by his assignment; and, if the debt be due and unpaid, he may, within the year, enforce the lien for his own sole benefit, if he have taken up the note, or for the benefit of himself and the assignee, if the latter is willing to indulge him by awaiting the result of that remedy."

This case is old, it is true; but that is not against it. It is true also that it has never been followed. This is because there has been no occasion to follow it, so far as the Kentucky Reports show. Nor is it inconsistent with Frailey v. Winchester, as is evident from what has been heretofore said.

I conclude, therefore, that this ground is not well taken.

In view of the line of reasoning herein put forth, I am constrained to hold that the claimant is entitled to the priority asserted, and orders will be drawn accordingly.

Digitized by Google

(153 Fed. 704.)

THE WILLIAM CHISHOLM. THE OCEANICA. LEHIGH VALLEY TRANSP. CO. v. CHISHOLM et al.

(Circuit Court of Appeals, Sixth Circuit. April 13, 1907.)

No. 1,620.

1. COLLISION—RULES FOR NAVIGATION OF GREAT LAKES—CONSTRUCTION OF PASSING RULE.

Rule 17 of the rules of navigation for the Great Lakes and their connecting waters (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 645 [U. S. Comp. St. 1901, p. 2891]), which provides that "when two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each shall pass on the port side of the other," has reference to the position of the two vessels when they will be meeting and about to pass each other, and not to their position when signals are given, if at that time they are on a temporary course from which they will depart before they will nearly approach each other.

2. SAME—STEAM VESSELS MEETING—VIOLATION OF PASSING RULES.

A collision occurred at night in Lake St. Clair, a short distance below the lower end of the cut, between the steamships Oceanica, going up, and the Chisholm, coming down. The vessels were on the usual courses, which would bring them head on when they approached each other, and the night was calm and clear. There was evidence tending to show that signals for passing port to port in accordance with the rules were exchanged, although that was in dispute; but it was shown without contradiction that, when the vessels were some 1,500 feet apart and head on the Oceanica gave a signal of two blasts, which was assented to, and that the Chisholm then put her helm hard astarboard and swung to port. It was also satisfactorily shown that the Oceanica did not starboard her wheel, but either stopped and backed, or kept to the right, and that the collision occurred some distance to the eastward of her original course. *Held*, that she was clearly chargeable with fault adequate to account for the collision, and that under the rule, which in such case raises a presumption in favor of the other vessel, which can be rebutted only by clear proof of contributory fault, the Chisholm could not be held in fault.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 33–42. Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

3. SAME—DAMAGES RECOVERABLE—REVIEW OF FINDINGS ON APPEAL.

The findings of a commissioner as to the damages recoverable for a collision, confirmed by the District Court, will not be disturbed on appeal, except for clear error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 306.]

Appeal from the District Court of the United States for the Eastern District of Michigan.

On exceptions to the commissioner's report, Swan, District Judge, delivered the following opinion in the court below:

An interlocutory decree was granted in the above-entitled cause adjudging the Oceanica solely in fault for the collision between that steamer and the steamer William Chisholm and dismissing the original libel. It was referred to the clerk to ascertain and report the damages suffered by the cross-libelants. The commissioner filed his report November 23, 1904. The libelant has filed nine exceptions to the report.

(1) The first exception includes the allowance to the owners of the Chisholm for repairs to the hull of the steamer and compensation for the loss of her use during detention for repairs necessitated by said collision.

(2) The second exception is directed specifically to the allowance of the item of repairs, $19,040.80, which is embraced in the first exception sub nom. "repairs."

Digitized by Google

These may be considered together. The reasonableness of the bills for the work done, and the fact that they were paid, is not questioned. It is denied that all the repairs made were necessitated by the collision. The inquiry is, therefore: Were they made necessary by the collision, or were they in part in renovation of old injuries to the bottom of the Chisholm done prior to the collision. Upon this question there is a conflict of testimony. It is claimed by the libelant that a large part of the repair bill was for injuries previous to the collision. While it is conceded that there were patches on the bottom plates before the collision, the cross-libelants' testimony is that, by settling on the boulders when she sank, these and other plates were impaired by the sinking so as to necessitate removal and rerolling, and that the work done to the bottom and the repair bill therefor is limited strictly to the reparation of the collision injuries and those consequent thereon by the sinking of the Chisholm after the collision. The work of repair, inclusive of the necessary removal of injured plates, required of necessity the repair of beams, angle irons, and other parts and pieces, and their repair and replacement or the substitution of new parts or pieces where required. Without discussing the proofs at length, it is sufficient to say that the evidence is not sufficient to overturn the commissioner's conclusions. These exceptions are overruled.

(3) The third exception is grounded on the allowance of $1,660.05 for lay days in dock while the Chisholm was under repair for the damages to her hull caused by the collision and sinking. The criticism on this item is that it assumes that the work of repairing the steamer's bottom was part of the collision damage, and that but seven days at the utmost were required to repair the break in the vessel's side. This assumption is not justified by the proofs. The steamer was laden with iron ore, and she was greatly injured when she settled on the boulders at the place of sinking. The testimony mainly relied upon that challenges the manner and time in which the repairs were done while the steamer was in dock is that of Mr. Oldham, but his views are not sufficient to override the conclusion reached by the commissioner on the testimony of other equally competent witnesses that it was properly and expeditiously done. The attack upon the order in which the work was done is rather upon the methods and judgment of the company which repaired the steamer. If the bottom was damaged, which is found to be the case, in what order it and other repairs should be made was for the company's determination, and not for the owner of the steamer to decide. Libelant's witness McDowell had no knowledge of the injuries and the repairs necessitated by the collision, except what he saw in the survey. McDowell's deposition, pp. 26, 27. On page 21 he expresses the opinion that $19,000 allowed by the survey "was sufficiently high to cover all the repairs called for by the survey," and, on page 17, that to repair the bottom it would be necessary to have the vessel in the drydock—"longer in the dock for the repairs to the bottom—considerably longer" than would be required for the repair of the top sides. While it may be true that the cost of repairs exceeded the estimate made by the surveyors, it is well known that a survey of this character is merely an estimate and frequently below the cost of the work.

The claim that the repairs to the bottom were not caused by the collision, and that the vessel was in dock longer than necessary, is disproved by the proofs.

It is further objected that the testimony is insufficient to sustain the commissioner's finding as to the extent and cost of the repairs. The degree of evidence insisted upon by libelant is impracticable and unnecessary. It would be impossible for any witness to testify that particular plates, beams, angle irons and other material were put in certain places, or to identify each item charged for as used in reparation of the injury. The survey recognizes most of them as needful for that purpose, and it is sufficient that the shipowner paid in good faith the bill rendered for the work. The presumption is that the work was done bona fide. Fraud is not to be presumed, but must be established clearly. Over six years had elapsed before this testimony on the reference to ascertain and report the damages was taken. This delay was largely caused by libelant. The Chisholm had been repaired entirely before the cause was tried. It would have been impossible for any workman or witness after the re-

Digitized by Google

pairs were completed to have identified all the several plates, parts, and pieces which went into the work. The painting of the vessel alone, as is customary after the metal has been restored, would have made identification next to impossible. The witness Richardson was present during most of the repairs, and Oldham, libelant's witness. The surveyors certified (Exhibit 28) that she "had been strongly and neatly repaired in accordance with the recommendation" in 1894—five years before this collision. No intervening injury to her bottom is shown until this collision. The bottom damage must be referred to this collision in the absence of proof of another cause. The proof given as to the character and extent of the injuries and of the repairs necessitated thereby, with proof of the bona fide payment of the bills, therefore, is all that can be reasonably exacted in such cases. Orhanovich v. Steam Tug America, 4 Fed. 337-341, approved in The Bulgaria, 83 Fed. 312, 314; The Bratsberg, 127 Fed. 1005; The Providence, 98 Fed. 135.

The onus of proving that repairs other than those resulting from the collision are included in the bills paid is upon the original libelant. The proofs are satisfactory that the Chisholm's bottom was injured—heavily laden as she was with iron ore—when she sank, and they make a case which justified their allowance by the commissioner.

The findings of the commissioner are presumably correct. They stand on the same plane as a master's report in respect to the weight to be accorded to them, and, where they deal with conflicting testimony, are not to be set aside except for clear error or mistake. Egbert v. Baltimore, etc., Co., 2 Benedict, 224, Fed. Cas. No. 4,305; Tilgham v. Proctor, 125 U. S. 149, 150, 8 Sup. Ct. 894, 31 L. Ed. 664; The Providence, 98 Fed. 135, 38 C. C. A. 670. This exception has no merit, and is overruled.

Fourth Exception. This is overruled. The services of the tugs were necessary. The steamer could not be safely navigated after the collision without their aid.

Fifth Exception. This is sustained. It is largely a charge for expenses of the owner of the Chisholm in preserving their rights against the insurers of the steamer. This item of $11.39 is disallowed.

Sixth Exception. This is made to allowance of $90 (Exhibit 5) for tug bills going to and from the sunken Chisholm after the collision. The bill of $10 for tug August 16, 1896, is not sustained by the testimony that the trip was necessary. Of course, it could not be allowed for taking lawyers and insurance agents to the wreck. No specific objection is made to the other items in Exhibit 5, and it is allowed at $80, instead of $90.

Seventh Exception. This must be overruled. The brief for libelant states: "We have no objection to the allowance of Carr's fee." That fee is the only subject of the exception.

Eighth Exception. This is overruled. The voucher states that the trip was made in connection with the repairs, and the testimony of Richardson (page 26) is that his expenses at Detroit and for the trip to Buffalo were not connected with the insurance of the Chisholm. There is no evidence to the contrary. This charge seems sanctioned by Hobson v. Lord, 92 U. S. 412, 23 L. Ed. 613, which is authority for allowing the expenses of an agent for the owner in like cases. If the owner were present in person for the protection of his interest in the injured vessel, in such cases his reasonable expenses and a fair allowance for his time and services would be proper as an element of the damages caused him by the collision. No reason is given why like expenses incurred by his agent in performing the services should not be reimbursed as a natural and necessary consequence of the disaster. The judgment of the commissioner who saw the witnesses and had an experience of 35 years in references involving such questions as are here presented carries great weight, and is not to be lightly disturbed. It would prolong an inquiry of this kind interminably if it were necessary for the owner of the injured vessel, in proof of damages, to adduce the testimony of every shipwright and metal worker who worked upon the repairs to verify each minute charge for labor or material which makes up the aggregate of the expense of restoration of the vessel to her condition preceding the collision or to require a sworn itemized statement of the time spent by each person employed in the work of raising and repair. The inquiry before the commissioner seems to have been search-

Digitized by Google

ingly conducted by both parties, and that officer had the benefit of full argument by the counsel for the respective parties. His conclusions were apparently the result of deliberation and his characteristically careful consideration. The proofs made it necessary for him to weigh conflicting testimony. It is not enough to discredit his findings that the court might have taken another view of contradicted questions of fact. It must be shown that this judgment was clearly wrong, or that he erred in the law. Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; The Cayuga, 59 Fed. 488, 8 C. C. A. 188.

Ninth Exception. This objects to the allowance of interest on cross-libelant's damages. The question was elaborately argued before the commissioner, and, as upon every other point in the case, the proofs are conflicting. The considerations urged by both sides were heard at length by the commissioner. The question of responsibility for the delay was the subject of testimony which were weighed by him, and no valid reason is shown for disapproval of his judgment upon that issue. Interest on disbursements for repairs is generally allowed as a part of the damages. It is incumbent on libelant to show error by the commissioner in holding that there was no reason for denying it in this case. The delay in taking the proof of damages would seem to have been held the fault of cross-libelant. The testimony submitted with the commissioner's report, and on which it was based, does not disprove the correctness of his finding on this point. This conclusion must stand, and the exception must be overruled.

The report as herein modified is confirmed, and all other exceptions thereto overruled. This sustains exception 5 and the charge of $10 in exception 6. The sum of the deductions from the amount allowed by the commissioner's report is therefore $21.39.

H. A. Kelley, for appellant.

H. D. Goulder and F. S. Masten, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is a suit in admiralty, wherein the appellant, the Lehigh Valley Transportation Company, as owner of the steamship Oceanica, libeled the steamship Chisholm in a cause of collision. The appellees, claiming to be owners of the latter vessel, answered the libel, denying all fault, and filed a cross-libel against the Oceanica, charging her with being at fault and solely responsible for the consequences which ensued. The cross-libel having been answered, the testimony of the parties was taken in open court, and upon the hearing the libel of the appellant was dismissed, and the cross-libel of the appellees was sustained. The damages, with interest, were assessed at the sum of $61,618.65. A decree was entered for that amount and costs in favor of the cross-libelants. The damages of the Oceanica probably amounted to nearly an equal sum.

The collision occurred a short distance below the lower end of the Cut, a dredged channel 800 feet wide, in Lake St. Clair, at about 11 o'clock of the night of August 14, 1896. The Oceanica was a vessel about 262 feet long and 16 feet draught and was bound up, having a cargo of coal of 1,900 tons. The Chisholm was nearly as large, and was coming down carrying about the same tonnage of iron ore. A mile and three-quarters below the Cut is Windmill Point, on the port hand of vessels coming up, and on passing that the usual course for vessels of this size is, or was at that time, laid on the Lower Beacon Light, standing near the east side and at the lower end of the Cut. This course is straight east northeast, and is followed about

Digitized by Google

a mile and a half until the vessel approaches the lower end of the Cut, whereupon it swings to port about 1½ points and proceeds up, or near, the midway of the channel. The course of vessels coming down is the reverse of this. The weather was calm and clear, and there was nothing in the conditions to create any difficulty or embarrassment in the navigation of the vessels. While the Oceanica was bearing up from opposite Windmill Point, on her heading for the Lower Beacon Light at the east side of the foot of the Cut, the Chisholm was coming down the channel above. The Oceanica, directly after passing Windmill Point, had passed on her port side a tug and tow going down, with which she exchanged a signal of a single blast. The Chisholm, on coming to the lower end of the Cut, or shortly before, saw coming up on her starboard bow a small steamer, which proved to be the Cottrell and a tow. With this steamer she exchanged a signal of one blast and passed it starboard to starboard; the little steamer swinging in as the Chisholm passed out of the Cut. Thus far there is no difficulty in perceiving the situation, and we come to the period when the Oceanica and the Chisholm began, or should have begun, to establish their understanding for passing each other. From this time on, until immediately before the collision, the testimony, especiallly that concerning the signals given by each of the vessels, and much that relates to the distances between them when the signals were given, and to the maneuvers of the Oceanica for a few minutes before the collision, is in an almost hopeless conflict. The libel for the Oceanica charges that the signaling, distances, and maneuvering of the vessels were as follows:

"That the said steamers continued on their respective courses, and when within the usual signaling distance the Oceanica sounded two blasts of her steam whistle to the said steamer Chisholm, which was answered by two blasts from the Chisholm. That at the same time the helm of the Oceanica was starboarded slightly. The Chisholm was then nearly ahead, and showing her green and range lights, indicating that she would pass the Oceanica starboard to starboard. That the steamers continued to approach, until they were a short distance apart, when suddenly the Chisholm blew one blast of her steam whistle, and exhibited all of her lights to the watch on the Oceanica. The Oceanica replied with two blasts of her whistle, and her engine was immediately checked. The Oceanica then blew four or five short blasts of her whistle, and her engine was stopped and backed. But the Chisholm, without apparently reducing her speed, came on, swinging rapidly to port, and struck the stem of the Oceanica, crushing her in forward, below the water line. The headway of the Oceanica was almost stopped, and the force of the collision drew her stem around to the eastward. The engine of the Oceanica continued to back until she backed away from the Chisholm, when she turned around down the river, under a hard aport helm. The water coming in rapidly, she was headed to the westward and an effort made to reach shallow water, but she sank in deep water."

The Chisholm's statement in her answer and cross-libel is as follows:

"The Oceanica blew to the Chisholm a passing signal of one blast, to which the Chisholm promptly responded with one blast, the vessels being then substantially end on, and was about to port and draw over to starboard, the order having been given, when the Oceanica blew to her a passing signal of two blasts and shut out her red light, evidently having starboarded. The distance and positions of the vessels fully warranting it, the Chisholm replied with two blasts and promptly starboarded, in accordance with the signal, and was swinging under starboard helm. The vessels were about to pass starboard to

Digitized by Google

starboard, with no risk of danger of collision present, when, as they approached close to each other, the Oceanica opened up her red light again and blew one short blast of her whistle. The positions of the vessels then, the short distance separating them, and the fact that the Chisholm was swinging under starboard helm, made it impossible to recover and pass under single blast whistles, port to port, and so the Chisholm at once signaled to reverse her engine full speed astern, which was promptly done, engine whistles being heard on the Oceanica, but the Oceanica, swinging rapidly to starboard, came into the Chisholm, then well to the eastward, with her headway nearly or quite stopped, striking her on her starboard quarter, abreast of the engine room; and such was the speed of the Oceanica and the weight and force of her blow, delivered stem on, that she cut into the Chisholm some 10 feet, making a breach down to her bilge, through which the water poured in such quantities that the stern of the Chisholm sank immediately to the bottom, substantially where she was struck."

Thus it is seen that a very important question is whether the first passing signals given and answered were double blast signals, as claimed by the Oceanica, or single blast signals, as stated by the Chisholm. The crews on each vessel, as usual, maintain in their testimony the contest made by each; but, before passing to the proofs, we should recur to the original libel. It is there alleged that the first signal was a double-blast signal from the Oceanica, and that this was replied to by two blasts from the Chisholm. Both sides agree that at one time double blast signals were exchanged, though they do not agree as to the time when this occurred. The allegation of the libel of the appellant is that the Oceanica began the signaling with two blasts, and that at that time the Chisholm was "nearly ahead." The Chisholm was at that time, it says, showing her green light, and that she was then coming out of the Cut. Her course would then be, according to the usual navigation, to swing to starboard down the reach toward Windmill Point, and the vessels would then be nearly end on. Such would be their position as they would approach each other, and such by the concurrence of the testimony from both vessels was what in fact occurred. By rule 17 of the rules prescribed for the navigation of the Great Lakes and their connecting waters by the Act of February 8, 1895, c. 64, § 1, 28 Stat. 645 [U. S. Comp. St. 1901, p. 2891], it was provided that:

"When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each shall pass on the port side of the other."

Obviously, this language has reference to the position of the two vessels when they will be meeting and about to pass each other, and not to their position when signals are given, if at that time they are on a temporary course from which they will depart before they will nearly approach each other. The Iron Chief, 63 Fed. 289, 11 C. C. A. 196, 22 U. S. App. 473; The John L. Harbrouck, 93 U. S. 405, 23 L. Ed. 962; The Victory and The Plymothean, 168 U. S. 410, 418, 18 Sup. Ct. 149, 42 L. Ed. 519; The D. S. Stetson, 4 Ben. 508, Fed. Cas. No. 4,104; The John Taylor, 6 Ben. 227, Fed. Cas. No. 7,429; The Velocity, L. R. 3 P. C. 44; The Oceano and The Virgo, 3 Prob. Div. 60; Mars. Collisions (2d Ed.) 473.

The cases of the Velocity, supra, and of the Iron Chief, a case decided by this court, are good illustrations of this rule, the former be-

Digitized by Google

ing a case of collision in the River Thames, and the latter of a collision near the change of course from Waiska Bay into the channel below—and see the observations of Brett, L. J., in the Bywell Castle, 4 Prob. Div., at page 224. What we have here said is because the libel for the Oceanica states, as if it were a factor indicating the propriety of her course, that when the first passing signals were given "the Chisholm was then nearly ahead and showing her green and range lights, indicating that he would pass the Oceanica starboard to starboard." The captain of the Chisholm says that at about that time she had the other vessel's green and red lights, which, of course, would locate his vessel as dead ahead of the Oceanica; but he also says that he was then turning down out of the Cut and coming on to the course toward Windmill Point. It is obvious that in these conditions the Chisholm would be showing her green lights to the other vessel until she had completed her turn and was substantially head on with her, and if, as her libel implies, the Oceanica accepted the green light as an indication that the Chisholm intended to pass her on the starboard hand, it was at fault in adopting that conclusion.

But the testimony leaves no doubt that these vessels were meeting each other nearly end on for an amply sufficient time to comply with the seventeenth rule, and the answer and the proof of the Chisholm are to the effect that, at the time when the passing signals of two blasts were exchanged, the vessels were coming into that position. In these conditions the Oceanica was at fault, if, as her libel tends to show and her testimony states, she at no time gave other than double-blast signals. This she had no right to do, if they required her to take the wrong course. But we are satisfied that her libel in this respect is not true. On the contrary, we are convinced that she gave and received a signal of a single blast a considerable time before she gave her signal of two blasts, and that the latter was not given until the vessels nearly approached each other. This for several reasons: First, because from her position she would be likely to choose the ordinary way of passing; second, because the original exchanging of a single blast and the later giving of a double blast by the Oceanica explains, and is consistent with, the action of the Chisholm. It seems incredible that she should have so suddenly swung off to port under a hard astarboard wheel, unless she had suddenly been constrained by the Oceanica to alter her previous course; third, because it seems to us that the nearness of the Oceanica to the Chisholm, when, as the Oceanica states, the double blasts were exchanged, indicates that pilots having proper regard to their duties would not have so long delayed their passing agreement; besides, there is a quality in the evidence of those on the Chisholm which is more persuasive than that coming from the Oceanica, and the judge of the District Court, who saw and heard the witnesses, seems to have had the same impression; finally, the case made for the Oceanica is so irreconcilable with the locality of the collision that confidence in any part of the testimony is seriously shaken.

One would have expected that some light upon the circumstances of the collision might have been shown by the crew of the Cottrell, which was not far off. The captain of that vessel was called by the

Digitized by Google

judge to testify; neither of the parties being willing to vouch for him. But his testimony proved pointless and inane.

The darkest part of the case is the conduct of the Oceanica after the time when she gave her two-blast signal, and when she saw the Chisholm turning out abruptly on her hard astarboard wheel. There was no reason why she should not have turned to port and proceeded in accordance with her response. There was even less danger in doing that than in remaining where she was or in checking and backing, which would have a tendency to throw her stem to starboard. She gave testimony tending to show, and her counsel argues, that she nearly stopped in her course and remained almost dead on the line where she was, overcoming her progress by checking and backing, and that while she was doing this she was struck on her stem by the broadside of the Chisholm; but there are strong indications which discredit even this story, faulty as this conduct would have been. The captain of the Oceanica testifies that the Chisholm was already sunk on her heel when the two vessels came apart after the collision, and she was later found there, with her head down stream, apparently drifted around on her heel, in the direction of the current, while sinking. The place where she sunk was about 800 feet distant to the east from the course which the Oceanica would have taken if she had gone straight ahead. This demonstrates that the Oceanica had, after her signal, gone far off to starboard, and is very persuasive that she was not checking and backing until immediately before the collision. It seems difficult to believe that her conduct could be so wanton; but, in this maze of contradictions in the proof, one's judgment feels on safest ground when it finds a substantially incontestable fact from which to estimate the probabilities; and the place where the collision occurred is satisfactorily proved. The severity of the wound in the side of the Chisholm by the stem of the Oceanica, an opening 18 feet in length from top to bottom and 6 feet wide, while not conclusive, rather tends to confirm the belief that the Oceanica was still advancing with considerable speed at the time of the collision, notwithstanding she had reversed her engine a short time before, as the evidence seems to prove.

We have no hesitation in holding that the Oceanica was rightly condemned.

We are next required to consider the case against the Chisholm. The testimony from those on that vessel, to which, as we have said, we are inclined to give the greater credit, is that, while the vessels were at a proper distance apart, the Oceanica blew a passing signal of one blast, to which the Chisholm responded with one and checked down; that at this time the vessels were nearly ahead of each other; that the Chisholm ported her wheel a little; that they continued to approach each other, both vessels showing their green and red range lights; that when they were about 1,500 to 2,000 feet apart, and there was no difficulty in passing either port to port or starboard to starboard, the Oceanica blew a double blast, to which the Chisholm responded with two and immediately turned her wheel hard astarboard, turning out sharply to port, and closed out the red light of the Oceanica; that soon thereafter the Oceanica showed her red

Digitized by Google

light again and blew one blast of her whistle, to which the Chisholm did not reply, but signaled her engineer by two whistles to reverse, which was done; that the signal to the engineer was repeated, and a further signal was given to back the vessel, and these orders were complied with; that the result of the backing was to turn the stern of the Chisholm away from the direction the Oceanica was then coming, but the latter struck the Chisholm on her starboard quarter, near the engine room, well aft, at about a right angle; that the Chisholm filled rapidly at the opening and sank on her heel. If these were the facts, we see no fair ground for reversing the decree which absolved the Chisholm from fault. We are convinced that the account she gives of her conduct is substantially correct. Some criticism is made by counsel for appellant upon the statement that the Chisholm put her helm hard astarboard and swung out so rapidly to port on getting the double-blast signal of the other vessel and of her captain's explanation, when he says: "I wanted to quit that business. I wanted to get far enough away, so there would be no more exchanging of whistles." But if, as he says, there had been a reversal of the original signal, and that at the near approach of the vessels, we do not think his explanation altogether unreasonable. But both sides agree that in fact the Chisholm swung out rapidly, as stated. She must have had some motive for it; and if, as we think, her turning to port was done upon the invitation of the Oceanica, it does not lie in the mouth of the latter to complain of it. The Chisholm went off into water where the Oceanica had no right to be, and where the Chisholm was in no other danger.

We have discussed the case, as we suppose, upon all the relevant material facts, and do not differ from the conclusions of the District Court; but, upon a closer analysis of the more critical facts, we think it might be fairly summed up in this: That, without deciding the controversy whether a passing signal of a single blast had been exchanged or any other issue concerning preceding events, we find upon the concurrence of the testimony of both sides that the two vessels were approaching each other head and head, or nearly so, for a length of time before they would meet amply sufficient to make provision for passing. If they continued on such courses, there would be risk of collision. If the Oceanica, before the vessels were laid on these courses, but in anticipation thereof, had given a signal of one blast, as it was her duty to do, and that had been assented to, she had no right to change it, being under no necessity, and the other vessel was bound to assume that they were to pass port to port until the Oceanica gave clear signs that she was not complying with the agreement; if she changed her purpose while they were proceeding end on and blew two blasts, she was bound to proceed accordingly and go out to port. But if, as she claims, she had given a double blast before the vessels came head and head, and had given no other, she was equally bound to go to port for passing, and in either case there was nothing in the conditions which made this dangerous or difficult. Her double blast would mean to the Chisholm "I am directing my course to port." If she was in doubt of the intention of the other vessel, she was bound to give an alarm whistle and check or stop and reverse, if necessary,

Digitized by Google

as required by rule 26; but, if she gave no notice of any embarrassment, the Chisholm was entitled to assume that she had none, and proceed accordingly. Thus, upon any fairly possible construction of the facts, the Oceanica was grossly at fault. By her own account, although she at no time gave or assented to any other than a double-blast signal, she was never on the west side of the midway of the sailing course, and, if the clear indications are to be relied upon, she came into collision at least 800 feet to her starboard of the course she had been proceeding on, and she had given no notice of any doubt or difficulty, unless it be that she was whistling at the time when the collision was impending and beyond escape. It seems clear that but for her misconduct the collision would not have happened.

In these circumstances, the Chisholm is entitled to be judged by the rule long followed by the courts of England and of this country that when one vessel, clearly shown to have been guilty of a fault adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can be rebutted only by clear proof of a contributing fault. The Catherine, 2 Hagg. Adm. 145; The Sisters, 14 L. T. N. S. 338; The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; The Umbria, 166 U. S. 404, 409, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Victory and The Plymothean, 168 U. S. 410, 423, 18 Sup. Ct. 149, 42 L. Ed. 519; The D. H. Miller, 76 Fed. 877, 22 C. C. A. 597, 33 U. S. App. 717; The Comet, 9 Blatchf. 323, Fed. Cas. No. 3,051; The Sunnyside, 1 Brown's Adm. 227, Fed. Cas. No. 13,-620; The Athabasca (D. C.) 45 Fed. 651; The Mexico (D. C.) 78 Fed. 653.

Tried by this rule, we think the Chisholm could not be justly held responsible. But it seems proper to say that, aside from the rule just mentioned, we should be unable to specify any ground on which we should think it right to charge that vessel.

Some questions are presented by the brief of appellant in regard to the extent of the damages recovered. One is in substance that in making repairs on the Chisholm it was found that some of her bottom plates were indented and broken, and it is alleged that they were in a defective condition at the time of the accident, and that the appellant should not be charged the expense of new material; and, further, that more new plates and more extensive repairs were made and charged for than was necessary to renew the vessel. There is evidence to show that the bottom of the Chisholm was considerably bent and the plates somewhat broken; but there was evidence that she sank on stony ground, and that the boulders under her may have been responsible for the condition of her bottom. There was also conflicting evidence in regard to the necessity for so much new material in making repairs; but these matters were fully considered by the commissioner, and his findings were confirmed by the court. We do not find such clear error in this regard as would, under the established rule, justify us in disturbing the decree. The Cayuga, 59 Fed. 483, 8 C. C. A. 188; The La Bourgoyne, 144 Fed. 781, 75 C. C. A. 647.

Digitized by Google

The commissioner's report included interest on the damages, as is the usual practice. The appellant objected to this, for the reason that the case was so long spun out by delays in taking the testimony, which continued for several years; and the delays it is said were caused by the counsel for the appellees. It is not clear to us that the ground as stated is sufficient to require the withholding of interest. But, in all events, the court below knew more about the circumstances than we can know. In fact, there is nothing in the record which we can lay hold of in order to judge whether the complaint is well founded or not, or whether one side was more responsible for the delay than the other.

The result is that the decree of the court below must be affirmed, with costs.

(153 Fed. 714.)

MILLER v. STEELE.

(Circuit Court of Appeals, Sixth Circuit. May 15, 1907.)

No. 1,644.

1. WILLS—CREDITORS OF TESTATOR—ACTION AGAINST LEGATEE—FORM.

An action in the federal court against a legatee in his lifetime, in which action only a money judgment without discovery or accounting was asked, was properly brought at law under Rev. St. § 723 [U. S. Comp. St. 1901, p. 583], declaring that suits in equity shall not be sustained in United States courts in any case where a plain, adequate, and complete remedy may be had at law.

2. COURTS—FEDERAL COURTS—PROCEDURE—EFFECT OF STATE LAW—WITNESSES—COMPETENCY—TRANSACTION WITH PERSON SINCE DECEASED.

In a suit in the federal court against a legatee on a contract for services rendered testator in his lifetime, whether plaintiff was a competent witness should be determined by the federal law, and not by the law of the state where the suit was brought, or the law of the state where the services were performed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 925, 984.

Competency in federal courts, following state practice, see notes to O'Connell v. Reed, 5 C. C. A. 602, and Bank of California v. Cowan, 21 C. C. A. 278.]

3. WITNESSES—COMPETENCY—TRANSACTION WITH DECEDENT—ACTION AGAINST LEGATEE—STATUTES.

Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], declaring that no witness shall be excluded because of interest, except that in actions by or against executors, administrators, or guardians neither party shall be allowed to testify against the other as to any transaction with or statement by testator, intestate, or ward, unless called to testify thereto by the opposite party, did not incapacitate plaintiff to testify in an action against a legatee for services rendered testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 653–657.]

4. WILLS—DEBTS OF TESTATOR—ACTION AGAINST LEGATEE—CONTRACT FOR SERVICES—RELATION OF PARTIES—INSTRUCTIONS.

In a suit against a legatee on testator's express contract to pay plaintiff for services rendered him, the court properly charged that the relation of the parties was a circumstance bearing on the probability of there being such a contract, and that, if the contract was not made, if plaintiff's relation to testator was that of his betrothed or future wife, and the services were rendered in that relation, she could not recover.

Digitized by Google

5. EVIDENCE—SUFFICIENCY AND WEIGHT OF EVIDENCE.

In a suit against a legatee on a contract for services between plaintiff and testator, it was not error for the court to refuse to charge that the proof of plaintiff's claim must be clear and unequivocal in order to entitle her to recover; a preponderance of the evidence being sufficient.

6. COURTS—FEDERAL COURTS—PROCEDURE—WRIT OF ERROR—SCOPE OF REVIEW—MOTION FOR NEW TRIAL.

The action of the federal court in refusing a motion for a new trial is not reviewable on a writ of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 937.]

7. TRIAL—VERDICT—AMENDMENT.

A verdict may be amended with reference to both matters of form and substance during the term, either by reference to the judge's notes taken at the trial, or by other satisfactory evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 791-801.]

8. SAME—INTEREST.

A petition, in an action against a legatee on an express contract between plaintiff and testator for plaintiff's services, alleged that testator died December 29, 1901, and prayed judgment for $21,000 and interest from that date. The jury returned a verdict finding the issues in favor of plaintiff and awarding her $21,000 and interest. *Held* that, the date of testator's breach of contract being fixed by his death, the court was justified in amending the verdict during the term by adding interest from that date.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

Jacob Shroder, for plaintiff in error.

Frank W. Cottle, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is an action at law prosecuted by the defendant in error, Mary L. Steele, to recover from the plaintiff in error a sum which she claims to be due her under a contract for services rendered to John M. Wilson, who died December 29, 1901, leaving a will whereby he bequeathed all his estate to Eliza B. Miller, the defendant below. Miss Steele and said Wilson were residents of the city of New York at the time when the contract is alleged to have been made and while the services were being rendered; the former being a teacher in the public schools, and the latter an inspector at the customs office in that city. He died at Cincinnati, while on a visit to Mrs. Miller, who was his sister. His will was probated in New York. The husband of Mrs. Miller was appointed sole executor, administered the estate, and turned over to Mrs. Miller the whole sum remaining thereof after paying debts and expenses; the sum received by her being about $70,000. The executor's accounts were settled in the Surrogate's Court, and he was discharged May 19, 1903. Mrs. Miller was and is a citizen of Ohio, resident at Cincinnati. This suit was brought in the Circuit Court of the United States for the Southern District of Ohio, July 5, 1905. It is founded upon certain provisions of the New York Code of Civil Procedure, giving a remedy to creditors of deceased persons who have not proved their claims during the course of ordinary administration, whereby they may

Digitized by Google

obtain satisfaction of their debts from legatees and other beneficiaries who have received assets of the estate.

In her petition the plaintiff (below) stated that she rendered the work, labor, and services for which she sues as nurse for said Wilson, who was an invalid, and "that at the time of and during the performance of the work, labor and services, above referred to, said John M. Wilson, now deceased, promised and agreed to pay this plaintiff therefor the sum of $25,000, in cash, or in securities of the value of $25,000, and, in the event of his decease prior to such payment, he promised and agreed to make a testamentary bequest to plaintiff of such sum to be paid to her out of his estate, or to set aside securities of the value of $25,000, as plaintiff's property to be delivered to her upon his decease. That said plaintiff, in reliance upon said promise and agreement, fully performed such work, labor, and services on her part, but John M. Wilson, now deceased, failed to make any testamentary bequest to plaintiff of such sum or any part thereof, nor did he set aside securities of the value of $25,000 or any securities as plaintiff's property to be delivered to plaintiff upon his decease, nor has plaintiff received any payment or recompense for such services from John M. Wilson, now deceased, or from his estate, except that plaintiff has received the sum of $4,000 on account thereof." She then proceeds to state the making of the will, the death of the testator, the probate of the will, the administration, that the publication of notices to prove claims was unknown to her, and that the defendant as sole legatee had received the assets, which consisted of personal property amounting to $100,000. She thereupon prayed "judgment against the defendant for the sum of $21,000 and interest from the 29th day of December, 1901." The sections of the New York Code relied upon were sections 1837, 1838, and 1841. These, with sections 1839 and 1840, which are exhibited by the answer of the defendant read as follows:

"Sec. 1837. An action may be maintained as prescribed in this article against the surviving husband or wife of a decedent and the next of kin of an intestate or the next of kin or legatees of a testator to recover, to the extent of assets paid or distributed to them, for a debt of the decedent upon which an action might have been maintained against the executor or administrator. The neglect of the creditor to present his claim to the executor or administrator within the time prescribed by law for that purpose, does not impair his right to maintain such an action.

"Sec. 1838. An action, specified in the last section, must be brought, either jointly against the surviving husband or wife and all the legatees, or all the next of kin, as the case may be, or at the plaintiff's election against one of them only. But where a legacy is received by two or more persons jointly, they are deemed one legatee within the meaning of each provision of this article, relating to legatees.

"Sec. 1839. Where a joint action is brought as prescribed in the last section, the whole sum which the plaintiff is entitled to recover, must be apportioned among the defendants, in proportion to the legacy or distributive share, as the case may be, received by each of them; and the final judgment must award against each defendant separately the proportionate sum thus ascertained. The costs of the action, if the plaintiff is entitled to costs, must be apportioned in like manner; except that the expense of serving of summons upon each defendant must be taxed against him only, and one sheriff's fee for returning an execution may be taxed against each defendant against whom any sum is awarded.

Digitized by Google

"Sec. 1840. Where an action is brought against the surviving husband or wife only, or against one only of the next of kin or legatees, the sum which the plaintiff is entitled to recover, cannot exceed the sum which he would have been entitled to recover from the same defendant, in action brought as prescribed in the last section.

"Sec. 1841. If the action is brought against a legatee, or against all the legatees, the plaintiff must show, either, (1) that no assets were delivered by the executor or administrator of the decedent, to the surviving husband or wife, or next of kin; or (2) that the value of assets, so delivered has been recovered by some other creditor; or (3) that those assets, after payment of the expenses of administration and preferred demands, are not sufficient to satisfy the demand of the plaintiff; in which case, he can recover only for deficiency."

For the defendant a demurrer to the petition was filed on the ground, as therein assigned, "that this court is without jurisdiction at law of the cause set forth in the petition." The demurrer was overruled. The defendant thereupon answered the petition "without waiving her objection to the jurisdiction at law," admitting the death of Wilson, the making and probate of his will, the administration by the executor, her receipt of the assets as sole legatee, that the testator left no wife or children, and that, although he left next of kin, none of the assets came to them except those delivered to her. For her second defense she set out sections 1837, 1838, 1839, and 1840 of the New York Code, above mentioned, and concluded that "by reason thereof this court cannot take cognizance of this case on its law side." The making of the alleged contract between the plaintiff and Wilson was denied by the general denial of matters not admitted. Upon the trial evidence was adduced tending to show the making of the contract alleged in the petition and the rendition of the services as therein alleged. From the evidence it further appeared that, at the time when the services were rendered, the parties to the contract were engaged to be married at some future time, the date not being fixed, but depending on subsequent conditions, and that they lived in the same tenement, but on different floors, or in different rooms on the same floor, but not as husband and wife. There was evidence that he paid the rent for both, some of the time at least; but this was denied by the plaintiff. The plaintiff was permitted to testify in her own behalf, against the objection of the defendant, that she was incompetent, and an exception was duly taken. At the conclusion of the evidence several requests for instruction to the jury were presented by counsel for defendant, but only one of them need now be stated. This was as follows:

"If the relation between the plaintiff and John Wilson were as parties affianced or betrothed to each other, and if during the period of this relationship they were living in one household and as members of one family, and if during such relationship and mode of living the services claimed by plaintiff to have been rendered for Wilson were in fact rendered for him, in such case it is incumbent on plaintiff to establish her claim by clear and unequivocal proof of the existence of an express contract. In such case no claim can be allowed to rest on an implied contract. The contract must be an express one, which must be proven by clear and unequivocal proof; it is not sufficient to prove the existence of a contract or its terms by only a preponderance of the evidence. The court refused to give said special instruction, to which ruling of the court counsel for the defendant at the time excepted."

Digitized by Google

The court in its instructions to the jury, after observing that the engagement between the parties was not set up in the pleadings, but had "been brought into the case as one of the circumstances tending to throw light upon the contract which is set up and relied upon," said:

"Under this contract she was not the betrothed of Wilson; she was simply a servant. Now, the promise set up in the contract, if made with reference to making provision for her as his future wife, then such promise would not support the contract set up here; but if the promise was, as she claims it to be, a promise to pay her $25,000 for work and labor and services to an invalid, as his nurse, attendant, and companion, if the evidence satisfies you that that was the contract, and that he failed to perform it, and there is no question about that, he never did pay her $25,000, he made no provision for such payment in his will, and, so far as we are advised, he never set aside any securities to be delivered to her after his death, if that was the contract, and she performed it, then she would be entitled to recover the amount claimed in the petition, $21,000, it being admitted in the petition that $4,000 has been paid. But if the contract was not made, if her relation to him was that of his betrothed, his future wife, if that was the relation, and the services were rendered in that relation, then she would not be entitled to recover. In other words, if the purpose was to make some provision for her as his intended wife, especially in contemplation of his death, then no promise or undertaking of that kind would fall under this contract. Under this contract, she would not be entitled to recover upon any such promise. But if the promise was made under this contract, if she agreed to render service, and he agreed to pay her $25,000 for that service, irrespective of any relation existing between them as persons engaged to be married, then, as I have said, she would be entitled to recover."

The jury returned their verdict as follows:

"We, the jury, herein do find the issues joined in favor of the plaintiff, and that she be awarded $21,000 and interest."

A motion for a new trial was made and overruled, and judgment was thereupon entered. The judgment entry is as follows:

"On consideration whereof, the court, being fully advised in the premises, doth find that said motion is not well taken, and should be overruled, and that a judgment should be rendered on said verdict, including interest from December 29, 1901.

"It is therefore ordered and adjudged by the court that the motion of the defendant for a new trial be, and the same hereby is, overruled, and that the plaintiff, Mary L. Steele recover of the defendant, Eliza B. Miller, the sum of $26,817, together with her costs herein expended, taxed at $———, for which let execution issue, to all of which defendant Eliza B. Miller by her counsel excepts."

The assignments of error are very numerous. But counsel for the plaintiff in error have, for their own convenience and that of the court, summarized their points for argument in an easily managed form, a practice much to be commended. The complaint is of errors:

"(1) In the rulings of the court on the ground of jurisdiction presented in the various forms.

"(2) In the rulings of the court in the admission of evidence.

"(3) In the action of the court in refusing to give the special charges requested by the defendant below.

"(4) In the action of the court overruling the motion for a new trial.

"(5) In the judgment entered upon the verdict."

We will take them up in this order.

1. It is urged that the case of the plaintiff as stated in her petition was not cognizable at law, but was one exclusively of equity jurisdic-

Digitized by Google

tion. It should be admitted, as contended, that in the federal courts there has always been, and still continues to be, a settled, but not always clearly defined, line of distinction between cases at law and in equity, and there is a corresponding difference in the spheres of jurisdiction which the court exercises over them. It is generally true that cases of one character can not be tried in the jurisdiction appropriate to the other. The leading and dominant proposition is that, when the capacity of a court of law is sufficient to give a suitable remedy, that is the proper forum in which to try the cause and obtain the proper relief. The judiciary act (Rev. St. 723 [U. S. Comp. St. 1901, p. 583]) emphasized the rule when it declared, in section 16, that "suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law." The remedy may be inadequate because the procedure at law is too inflexible to suit the exigencies of the case, or because the relief which a common-law judgment can afford is not adaptable to the peculiar facts. When neither of these difficulties are in the way, there can be no reason for resorting to a court of equity. The decisions upon this subject are too numerous for an exhaustive citation. Some of them are: Boyce's Ex'rs v. Grundy, 9 Pet. 275, 9 L. Ed. 127; Hipp v. Babin, 19 How. 271, 15 L. Ed. 633; Parker v. Winnipiseogee, etc., Co., 2 Black. 545, 17 L. Ed. 333; Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Lewis v. Cocks, 23 Wall. 466, 23 L. Ed. 70; Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451; Drexel v. Berney, 122 U. S. 241, 7 Sup. Ct. 1200, 30 L. Ed. 1219.

There is a numerous class of cases where there is a concurrent jurisdiction in courts of law and equity. This has resulted largely from the extensions of the jurisdiction of the courts of law into the field formerly exclusively occupied by courts of equity, and in such cases the plaintiff may resort to either. See the observations of Mr. Justice Cowen in McCrea v. Purmont, 16 Wend. (N. Y.) at pages 465, 466, 30 Am. Dec. 103. And see Kennedy v. Gibson, 8 Wall. 498, 505, 19 L. Ed. 476.

In the present case the judgment sought was one for a sum of money which would be simply given or denied, according to the finding upon the issues. The proof would be the same in either court, whether of law or equity. No discovery was sought, nor was there any accounting required. It was not a case for contribution among defendants; the statute giving the right to proceed against a single legatee. And, indeed, there was but the one legatee who was answerable. The case of Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966, would seem to be a distinct authority for maintaining a suit at law in such circumstances. The mere fact that equity has jurisdiction of trusts, and that the fund sought to be reached is in the nature of a trust fund, does not of itself make it necessary to resort to a court of equity, or displace the force of the rule which denies a resort to a court of equity when the law affords a full, adequate, and complete remedy. That rule extends over all classes of cases when the condition stated exists. If, in a case involving a trust, there is a necessity for the employment of the functions of a court of equity,

Digitized by Google

such as, for an accounting, or for the marshaling of assets or for contribution of proportions by several defendants, or a conditional judgment must be made, or some personal act of the defendant is required, then a resort to that court should be had; but, where there is simply an obligation to pay a sum of money, there can be no objection to a suit at law for its recovery, notwithstanding it may have become due in consequence of trust relations. Thus, where an account has been stated between the trustee and the cestui que trust of the matters of the trust, so that nothing remains but to pay over the trust fund, an action at law will lie for its recovery; and it is a sufficient answer to a bill of the cestui que trust, for the settlement of the trust and payment of the balance by the trustee, that the accounts have been settled and the balance ascertained, and that there is a suitable remedy by an action at law. Bispham, Principles of Equity (4th Ed.) § 485; 2 Perry on Trusts, § 843; 1 Story's Eq. Jur. § 523; 2 Lewin on Trusts (Flint's Ed.) 898, note 1.

We are therefore of opinion that the objection to the jurisdiction of the case because it was an action at law was properly overruled.

2. The second point is made upon the ruling of the court concerning the competency of the plaintiff to testify in her own behalf. This question does not depend upon either the law of Ohio or of New York, but upon the law of the United States relative to that subject. By section 858, Rev. St. [U. S. Comp. St. 1901, p. 659], it is provided that:

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: Provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

As is seen, this statute makes a party to the suit competent to testify unless the other party is an executor, administrator, or guardian. The courts have no authority to add others to the exception; nor can this be done by state legislation. White v. Wansey, 116 Fed. 345, 53 C. C. A. 634; Smith v. Township of Au Gres, 80 C. C. A. 145, 150 Fed. 257; Hobbs v. McLean, 117 U. S. 567, 579, 6 Sup. Ct. 870, 29 L. Ed. 940.

The ruling of the court in this regard was therefore right.

3. In the preceding narration of occurrences during the trial, it is stated that the court was requested to give an instruction to the jury in relation to the character of the proof required to establish a liability for services rendered by one party to another while they are holding a family relation with each other, which request was refused by the court, and reference was made to the charge of the court upon that subject. The court said that the relation of the parties had "been brought into the case as one of the circumstances tending to throw light upon the contract which is set up and relied upon." The case was not tried upon the issue of a quantum meruit; and it was submitted to the jury by the court as one resting solely upon the al-

Digitized by Google

leged contract. The judge so states in his opinion on the motion for a new trial, and the bill of exceptions bears out that statement. The court was entirely right in stating that the relation of the parties was a circumstance bearing on the probability of there being such a contract. However, the court instructed the jury that:

"If the contract was not made, if her relation to him was that of his betrothed, his future wife, if that was the relation, and the services were rendered in that relation, then she would not be entitled to recover."

So that it would seem the court charged the substance of the request of counsel, except that it did not charge that the proof must be clear and unequivocal, and that a preponderance of proof would not be sufficient. For the reason above stated, namely, that the case was being tried and submitted upon the issue as to the existence of the contract, the request in this respect, as well as what was said in response to it, would seem to be rather "beside the mark," and more confusing than helpful to the jury. With regard, however, to the latter part of the request, we more than doubt whether in such a case the law requires any other than that preponderance of proof which is required in all civil actions to maintain the issue. We are not aware of any reason for such an exception from the general rule, and, although such language has sometimes been employed by lawyers and judges, yet, as was said by Judge Campbell, in the opinion of the Supreme Court of Michigan in Watkins v. Wallace, 19 Mich. 57, where the court below had charged that fraud will not be presumed from slight circumstances, that the proof must be clear and conclusive, "juries cannot be expected to be familiar with the technical and stock phrases of the bench and bar; and, as there is a well-settled popular understanding of the different degrees of proof required in civil and criminal trials as a basis of conviction, a jury instructed to act only on conclusive evidence could hardly fail to suppose they must disregard all balancing of evidence, and require a case absolutely free from doubt. "No such rule prevails in any civil case." And the judgment was reversed solely for that error in the charge. The relation of the parties is of itself one of the circumstances which a jury will weigh in estimating the probabilities. It goes into the scale to the credit of the party for whom it counts. But, if it and all the other circumstances in favor of that party conjoined still leave a preponderance of the testimony the other way, the result cannot be otherwise than that the preponderance should prevail.

4. The action of the court in refusing the motion for a new trial is not reviewable on a writ of error.

5. This question is whether the court was authorized to add the interest on the sum of $21,000 from the time of the death of the testator, Wilson, and include that in the judgment entered on the verdict. The objection is that the verdict in that regard was too uncertain to warrant the court in adding interest from that date. There can be no doubt that it is incompetent for the court to add interest to the sum found by the verdict without sufficiently definite data, to be found either in the verdict or elsewhere in some part of the record or the minutes of the trial to which reference may properly be made. The question, therefore, is whether the record and

Digitized by Google

the minutes of the trial (which the bill of exceptions shows were kept in full) contained matter from which the court could construe the meaning of the verdict with sufficient certainty. In discussing the power of the judge to amend the verdict, it is said, in 22 Encl. of Pl. & Prac. 974–5, that "it is undoubted that a verdict may be amended from data given in the verdict itself; or referred to in the pleadings or record of the case." And in Matheson v. Grant, 2 How. 263, 11 L. Ed. 261, where this subject was fully considered in the opinion by Mr. Justice Story, it was held that the verdict may be amended by reference to the judge's notes taken on the trial, or by any other clear and satisfactory evidence, and that the practice is a salutary one and in furtherance of justice. This power is not limited to matters of form while the court retains control of the judgment, although after the lapse of the term it is so limited. See the opinion of Mr. Justice Woodbury in Bank v. Moss, 6 How. 31, 12 L. Ed. 331. The bill of exceptions in this record states that it contains all the evidence given upon the trial. It also contains the judge's charge in full—from all which we are able to see what the issues were which were really contested, and what were the questions submitted to the jury. The verdict in this case itself awarded interest on the sum of $21,000. The petition prayed judgment for that sum and interest from December 29, 1901. The issues therefore covered that item, and the verdict stated that the jury found the issues joined in favor of the plaintiff. The verdict established the making of the contract and the breach of it by the testator. It was optional with him to pay the plaintiff the $25,000 in money or securities in his lifetime, or provide for it in his will. He had not paid the amount in his lifetime, and he committed the breach of the contract by not providing for the payment of the amount in money or securities. It is a general rule of law that interest is due and payable upon a contract for the payment of a fixed sum at a time which is certain, or will become certain by lapse of time, from the date when the contract should have been, but was not, performed. And this is so whether or not the obligation carried interest before maturity. 1 Am. Lead. Cases, Hare & Wal. note (4th Ed.) 506; 26 Cyc. 1473; Young v. Godbe, 15 Wall. 562, 21 L. Ed. 250; New Dunderberg Min. Co. v. Old, 97 Fed. 150, 38 C. C. A. 89; Jourolmon v. Ewing, 80 Fed. 604, 607, 26 C. C. A. 23.

And we think the court might have properly instructed the jury as matter of law that, if they should find for the plaintiff, they should add interest from the date when the contract was broken. In Young v. Godbe and New Dunderberg Co. v. Old, supra, the questions arose on error alleged in the giving of instructions to the jury to add interest from the time of the breach of the contract, and in each case the objection was overruled. In these circumstances, we are inclined to think that the court was warranted in giving the interpretation to the use of the word "interest" by the jury to mean from the time from which by law it ought to be reckoned, and, moreover, that the jury meant by that word the interest claimed by the petition, namely, interest from December 29, 1901.

The judgment will be affirmed, with costs.

Digitized by Google

(153 Fed. 283.)

UNITED SHOE MACHINERY CO. v. GREENMAN.

(Circuit Court of Appeals, First Circuit. March 27, 1907.)

No. 663.

1. PATENTS—ANTICIPATION—ABANDONMENT OF MACHINE.

A machine fully embodying a device subsequently patented by another does not lose its effect as an anticipation because its use was abandoned, solely for the reason that the product in making which it was employed was not successful, where it is shown that the machine operated successfully, and that the maker did not abandon the invention embodied therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 73.

Abandonment of invention, see note to Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 70 C. C. A. 6.]

2. SAME—CLUTCH.

The Davey & Ladd patent, No. 672,056, for a clutch for starting and stopping machines, is void for anticipation by the clutch previously employed in the Stiles-Thomson machine for setting lacing studs in shoes.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 145 Fed. 538.

William K. Richardson (Joseph Warren, on the brief), for appellant.

T. Hart Anderson, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

COLT, Circuit Judge. This is a suit for infringement of the Davey & Ladd patent, No. 672,056. The patent was applied for March 31, 1897, and issued April 16, 1901. The court below dismissed the bill, and the case is now before this court on appeal.

The Davey & Ladd patent is for an improvement in clutches for starting and stopping machines. The improvement relates particularly to the stopping feature of the clutch. The specification says:

"This invention relates to a clutch and is shown as embodied in a clutch adapted to be used on sewing-machines, nailing-machines, and in machines in which it is desirable to stop the machine at a definite point in its cycle of movements—as, for example, in the case of the sewing-machine when the needle is at its highest position, or in the case of a nailing-machine after the nail is driven and when the parts are in the position to receive the material or at a position to receive the nail to be driven at the next operation of the machine. * * * The machine is thus stopped automatically at a definite point in the rotation of the main shaft, a, and therefore at a definite point in the cycle of operations of the instrumentalities actuated by said main shaft."

In machines to which the Davey & Ladd clutch is adapted, the machine should not stop while performing its cycle of operations, as, for example, in a nailing-machine during the various operations necessary to drive the nail. The characteristic feature of the Davey & Ladd clutch is that the machine is always stopped at the completion of its cycle of operations. Since the cycle of operations takes place at each revolution of the main shaft, this result is accomplished by so organizing the clutch that the machine is stopped at the same pre-

Digitized by Google

determined point on the main shaft. In one form of the device, the machine may be stopped at the completion of any number of revolutions of the main shaft, or at the completion of one revolution, depending on the will of the operator. In the other form of the device, the machine is automatically stopped at the completion of a single revolution of the main shaft.

In the organization of the Davey & Ladd device, we find a clutch member provided with a frictional surface at each end. This clutch member is connected with the main shaft, and is capable of a longitudinal movement thereon. When the operator presses the treadle with his foot, the clutch member is moved by a spring into contact with the frictional surface of the driving belt pulley, and the machine is set in operation. When the operator removes his foot from the treadle, the clutch member, by means of a cam on the main shaft and connecting mechanism, is moved away from the driving belt pulley, and into contact with the frictional surface of the stationary brake, and the machine is stopped. In a modified form of the device, the connecting mechanism between the cam and the clutch member is so arranged that, when the operator presses the treadle with his foot, the machine is automatically stopped upon the completion of one revolution of the main shaft. It is by means of the cam and connecting mechanism co-operating with the clutch member and stationary brake that the machine is stopped at a predetermined point on the main shaft, or when it has completed its cycle of operations.

The charge of infringement is limited to claims 2 and 6 of the patent. Claim 2 reads as follows:

"(2) The combination of the driving clutch member of the machine provided with a friction-surface; with the main shaft, and a driven clutch member connected to rotate therewith but capable of independent longitudinal movement thereon and provided with friction-surfaces at its opposite ends; and a stationary friction-surface or break, and means for impelling said driven clutch member into engagement with the friction-surface of the driving member, and connecting mechanism between the main driven shaft and driven clutch member for moving said driven clutch member out of engagement with the driving member and into engagement with the brake, substantially as described."

Claim 6 is substantially the same as claim 2, except that it specifies that the clutch is engaged with the brake "at a predetermined point in the rotation of said main shaft, whereby said main shaft is stopped in a predetermined angular position."

The combinations described in these claims comprise six elements: (1) The main shaft; (2) the driven clutch member connected with the main shaft and capable of longitudinal movement thereon, and with frictional surfaces at each end; (3) the driving clutch member; (4) the stationary brake; (5) means for impelling the driven clutch member into engagement with the driving member; (6) connecting mechanism between the main shaft and the driven clutch member for moving the latter away from the driving clutch member and into engagement with the brake.

The main defense to this suit is anticipation. The defendant has introduced in evidence the clutch mechanism of the prior Stiles-Thomson lacing stud setting machine as a full and complete anticipation of the

Digitized by Google

patent in suit. A comparison of this clutch with the Davey & Ladd clutch shows the substantial identity of the two structures. On this point, Mr. Browne, complainant's expert, says:

"On comparing the Stiles-Thomson machine with claims 2 and 6 of the Davey & Ladd patent in suit, I find in said machine all the features recited in each of these claims."

While the identity of the mechanism of the two clutches, except in details of construction, is apparent, the complainant contends: First, that the Stiles-Thomson machine was only an abandoned experiment; second, that there is no evidence that the clutch part of this machine was ever operated or ever tested as to its capacity for stopping the machine; and, third, that the subsequent Stiles patent is evidence of an intention on the part of Stiles to abandon the form of clutch embodied in the Stiles-Thomson machine.

The history and use of the Stiles-Thomson machine, as disclosed by the evidence, may be stated as follows:

The Stiles-Thomson machine was designed for setting bifurcated or two-pronged lacing studs in leather shoes. It was constructed from drawings, which are in evidence, by George A. Stiles, between September and November, 1893, in the factory of the Judson L. Thomson Company. The Thomson Company was engaged in the manufacture of rivets, clasps, and other hardware supplies. In order to meet competitors, it was desirous of manufacturing and putting upon the market a bifurcated lacing stud. It was the intention of the Thomson Company that the machine should be used by its customers. It was found, however, that a lacing stud with two prongs was not as good as a tubular lacing stud, because the prongs would not hold firmly enough in the leather to withstand the pull and strain of the lacing, and it was for this reason that only one machine was built, and that this use of this machine was discontinued.

"We found," says Mr. Bartel, treasurer of the Thomson Company, "that two prongs on the stud would not hold as well as a stud with a tubular shank. A bifurcated stud simply held the stud on two sides, where a stud with a tubular shank would split in six equal parts, holding all around."

Again, Mr. Bartel testifies:

"Q. Can you state any reason why the company built only one such machine? If so, please do so. A. I can. The reason only one machine was built was because the goods we intended to use the machine for were defective, and after experimenting for some time we abandoned putting the goods upon the market."

And to the same effect is the testimony of Mr. Thomson, president of the company:

"Q. Can you state why the said company built only one of these lacing stud setting machines? A. Because the two prongs would not hold firmly enough in the leather of the upper of the shoe so but what it would pull out under the strain of lacings, as it had only two sides or prongs, instead of a tubular form that had always been in general use, and it was thought best to abandon that kind of a lacing stud."

The machine was operated in the factory of the Thomson Company for a short time during the month of December, 1893. It was then laid

Digitized by Google

aside in the pattern room, where it remained until about the time it was introduced in evidence in the present suit.

As to the operation of the machine, Mr. Bartel testifies as follows:

"Q. To your personal knowledge, was defendant's Exhibit 'Stiles-Thomson Machine' used for setting bifurcated lacing studs in the uppers of shoes? If so, when was it first so used? A. In the latter part of 1893.

"Q. Where was the machine used for setting bifurcated lacing studs in the uppers of shoes? A. In the factory of the Judson L. Thomson Manufacturing Company, at Waltham, Mass."

"Q. Did the Judson L. Thomson Company put out any studs having bifurcated shanks? A. They never sold any.

"Q. So far as you know, can you state, of your own personal knowledge, whether the Stiles-Thomson machine operated successfully to set the lacing studs having bifurcated shanks? A. I think I can. I saw the machine operated, and it set the studs successfully in leather and in uppers of shoes."

To the same effect, Mr. Unbehend, the superintendent of the Thomson Company, testifies:

"Q. Do you remember whether the machine which you recall as being finished in December, 1893, was operated; and, if so, state what the said machine operated upon? A. I saw it operated on lacing studs; that is, for fastening lacing studs to shoes."

Upon the same point, Mr. Thomson testifies:

"Q. What did Mr. Stiles do after he completed the Stiles-Thomson machine? A. He worked the machine for me in the superintendent's office.

"Q. Did you see the Stiles-Thomson machine in operation setting lacing studs? A. I did.

"Q. When? A. During the fall of 1893."

"Q. Did you personally set any lacing studs with the Stiles-Thomson machine? A. I believe I did."

These witnesses are not interested in the present suit.

This evidence establishes these facts: The Stiles-Thomson machine was built in the fall of 1893, and successfully operated during December of that year. Only one machine was built, and that machine laid aside, not because it was not practical, or would not set bifurcated lacing studs, but because this form of lacing stud was inferior to the tubular form, in that it was liable to pull out of the leather under the strain of the lacings.

The complainant insists, however, that the evidence does not show that the Stiles-Thomson machine was run by power, or that the clutch mechanism operated successfully. The answer to the first proposition is that the machine was built to run by power, and in no other way, and that it could not have been operated by hand, because there is no device shown for so operating it. The answer to the second proposition is that, if the machine operated to set lacing studs, it necessarily follows that the clutch must have been practically operative, since it is the mechanism provided for starting and stopping the machine; in other words, the machine as organized could not have performed its function of setting lacing studs except through the instrumentality of the starting and stopping mechanism. Since it is established that the machine set lacing studs practically, it must be concluded that the clutch mechanism was a practical success. Again, the fact that the Davey & Ladd clutch in suit is practically operative

Digitized by Google

raises a strong presumption that the clutch of the Stiles-Thomson machine was practically operative, since the two clutches are substantially identical.

On July 21, 1894, some seven months after he built his machine for the Thomson Company, Stiles filed his application for a patent, which was granted August 11, 1896.

This patent covers the lacing stud mechanism of the Stiles-Thomson machine, but does not cover in terms the clutch embodied in that machine. With respect to the clutch mechanism, the patent may be viewed from three standpoints: From the standpoint of the drawings; from the standpoint of the specification; and from the standpoint of both the drawings and the specification.

First. Figures 2 and 3 of the drawings show the clutch of the machine; that is, the clutch as it appears when looking at the machine. On this point the complainant's expert, Mr. Mayo, testifies:

"Q. I will ask you to examine the Stiles-Thomson machine, and compare it with the drawings of the Stiles patent, and ask you whether or not these drawings of the Stiles patent do not correctly and truly illustrate the Stiles-Thomson machine in so far as the starting and stopping mechanisms of that machine are concerned? A. The lines in the drawing correctly represent a side view of the machine assembled, but they do not show a drawing in sections of the clutch mechanism.

"Q. As I understand your answer, what is shown in the Stiles patent drawings is a correct and true representation of the Stiles-Thomson machine, as you would observe that machine without taking it apart? A. Yes, sir."

The letter k in these drawings, which points specifically to the brake, may fairly be considered, if we confine our attention to the drawings, as referring to the clutch mechanism as a whole, for the term clutch in this art sometimes refers to the driven clutch member, and sometimes to the group of devices which comprise the clutch.

Second. The specification, on the other hand refers to the letter k of the drawings as the friction clutch k, meaning the driven clutch member; and it fails to describe or to make any reference to the stationary brake.

Third. Looking at the specification and the drawings together, there is a plain inconsistency between them which cannot be reconciled. In the attempt to harmonize the drawings with the specification, the complainant has constructed a so-called model of the clutch of the Stiles patent. This model is not built according to the drawings of the patent, and its defects as a practical device are obvious. It clearly does not serve to prove that there is no repugnancy between the drawings and the specification, but rather tends to strengthen the belief that Stiles intended to patent the clutch of his machine. The probability is that, in taking out his patent, Stiles paid little attention to the clutch, which is a common device in machines, and that his mind was directed mainly to the mechanism for setting lacing studs. He says in his patent that his "invention relates to machines for setting lacing studs in fabrics," and "incidentally" to "a start and stop mechanism."

While the Stiles patent cannot be regarded as an anticipation of the Davey & Ladd clutch in suit, it manifestly cannot be taken as evidence of any intention on the part of Stiles to abandon the clutch embodied in his machine.

Digitized by Google

Our conclusion is that the clutch of the Stiles-Thomson machine is a direct anticipation of the Davey & Ladd patent. The Stiles-Thomson machine was produced at the hearing in the Circuit Court, and also at the hearing in this court, and the substantial identity of the two clutch mechanisms was established by concrete proof. The evidence also shows that the clutch of the Stiles-Thomson machine was not used for purposes of experiment, or to gratify curiosity, or to see whether it was successful, or whether anything more was to be done to perfect it; but that it was put to use in ordinary business as a thing which was completed, and that the reason why it was only used for a short time has no bearing on the question of its practical operativeness. It thus fulfills the tests with respect to anticipation which the Supreme Court, adopting the views of Judge Shipman in the court below, applied in Brush v. Condit, 132 U. S. 39, 47, 48, 10 Sup. Ct. 1, 33 L. Ed. 251, and is also within the rules laid down in Deering v. Winona Harvester Works, 155 U. S. 286, 300, 301, 15 Sup. Ct. 118, 39 L. Ed. 153, Brooks v. Sacks, 81 Fed. 403, 26 C. C. A. 456, and Westinghouse Company v. Stanley Instrument Company, 133 Fed. 174, 177, 179, 68 C. C. A. 523.

The decree of the Circuit Court is affirmed, and the appellee recovers costs in this court.

(153 Fed. 578.)

MINARD v. DELAWARE, L. & W. R. CO.

(Circuit Court of Appeals, Third Circuit. April 19, 1907.)

No. 3.

COVENANTS—CONSTRUCTION—COVENANT OR CONDITION.

A provision in a deed conveying right of way to a railroad company requiring the grantee to erect a station house thereon and to stop all passenger trains there which stopped at other stations within three miles *held*, in view of other provisions, to constitute a covenant and not a condition subsequent.

In Error to the Circuit Court of the United States for the District of New Jersey.

Wm. J. Kearns, for plaintiff in error.

Conover English, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and LANNING, District Judge.

PER CURIAM. The specifications of error in this case present for decision the question whether a certain clause in a deed of conveyance referred to in the pleadings and offered in evidence on the trial should be construed as a covenant or a condition subsequent. In the Circuit Court Judge Cross (Minard v. Delaware, L. & W. R. Co. [C. C.] 139 Fed. 60) construed the clause as a covenant. We think the principles of law applicable to the case are correctly stated by him and we are content to rest our decision on his opinion.

The judgment of the Circuit Court is affirmed, with costs.

Digitized by Google

(153 Fed. 577.)

CONTINUOUS GLASS PRESS CO. v. SCHMERTZ WIRE GLASS CO. et al.

(Circuit Court of Appeals, Third Circuit. April 22, 1907.)

No. 8.

INJUNCTION—PRELIMINARY INJUNCTION—DISCRETION OF COURT.

While a preliminary injunction is to be cautiously used by a court of equity, it should not be withheld if, in the exercise of a sound judgment, it is deemed necessary to prevent injustice; and an order granting such an injunction will not be reversed by an appellate court except for an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 302-306.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

A. B. Stoughton, for appellant.

Thomas W. Bakewell and Wm. L. Pierce, for appellees.

Before GRAY, Circuit Judge, and HOLLAND and LANNING, District Judges.

LANNING, District Judge. On November 2, 1905, the Schmertz Wire Glass Company and the Mississippi Wire Glass Company filed their bill of complaint in the Circuit Court of the United States for the Western District of Pennsylvania, praying that the Continuous Glass Press Company be restrained from an alleged infringement of patent No. 791,217, for a process and apparatus for manufacturing wire glass. On March 28, 1906, an application for a preliminary injunction was denied. On April 6, 1906, an order was made providing that if the complainants, within four days from the date of the order, should file a schedule of the net prices and terms of sale of the styles of glass they alleged the defendant was manufacturing in infringement of the complainants' patent, agreeing to maintain those prices and terms during the pendency of the suit, the defendant should within one week thereafter have leave to signify its willingness to abide by such prices while the suit was pending, and that, on the defendant's failure so to do, the complainants might renew their application for a preliminary injunction. The complainants filed their schedule on the day of the date of the order, and on April 11th the defendant filed a statement signifying its willingness to abide by those prices and terms. On the same day, April 11th, the defendant issued to the trade a circular letter, the opening paragraph of which was as follows:

"By an order of court and agreements in pursuance thereof, copies of which are hereto attached, the Mississippi Wire Glass Company is after this date, April 11, 1906, debarred from selling its polished wire glass, rough wire glass, and ribbed wire glass at less than the following prices."

The complainants thereafter renewed their application for a preliminary injunction, on the ground that the circular letter was misleading in its character, and because, as it was proved, the defendant had represented at least to one party in Chicago that the order of the court was in effect a restraining order against the Mississippi

Digitized by Google

Wire Glass Company forbidding their selling wire glass at any other prices than those stated in the circular letter, and that it did not apply to the product of the defendant company. The argument on this second application was had on April 24th. The result was that the court vacated the order of March 28th and allowed a preliminary injunction. This action was based on the court's conclusion that:

"In view of the further and clearer light thrown on the fact of alleged infringement by the depositions and affidavits laid before the court subsequent to its order of March 28, 1906, refusing a preliminary injunction, and in view, also, of the action of the respondents in connection with the schedule of price lists suggested by the court, we have reconsidered our former order of March 28, 1906, refusing an injunction, and after due consideration are of opinion that our former order should be vacated and a preliminary injunction should issue."

On April 24th a second bill of complaint was filed by the same complainants against the same defendant asking for an injunction to restrain the defendant from infringing reissued patent No. 12,443, which was also for an apparatus and process for manufacturing wire glass. The above-mentioned order for a preliminary injunction was made applicable to both suits.

In this appeal complaint is made of that injunction order. The record of the case shows that the Circuit Court proceeded in the case with much deliberation and great care. While a preliminary injunction is to be cautiously used by a court of equity, it should not be withheld where, in the exercise of a sound judgment, it is necessary to prevent injustice. In the present case we are satisfied that the grant of the injunction was not in any sense an abuse of the discretionary power vested in the circuit court.

Without at present expressing any opinion on the merits of the two cases, we think the decree brought before us by this appeal should be affirmed; and it is so ordered.

(153 Fed. 258.)

MANSON v. DAYTON et al.

JARMUTH v. SAME.

(Circuit Court of Appeals, Eighth Circuit. January 24, 1907.)

Nos. 2,427, 2,428.

1. EVIDENCE—CONTRACTS—VARIANCE OF WRITING BY PAROL.

In the adjustment of private reciprocal rights, where the parties have deliberately put into writing their mutual convention, such expression of their intention and understanding is final and conclusive, and cannot be varied or controlled by any antecedent negotiations or declarations in pais.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1756]

2. PROPERTY—REAL OR PERSONAL—MANNER OF TREATMENT BY OWNER.

Slag, dumped as refuse from an ore smelter or mill while ordinarily appurtenant to the land on which it is dumped, may be treated by the owner of both the land and dump as personalty, and may be sold and delivered as such.[1]

[1] See note at end of case.

Digitized by Google

3. SALES—CONTRACT FOR CONDITIONAL SALE—REMEDY OF SELLER FOR BREACH.

Where the right to reclaim property conditionally sold is reserved to the seller in the event of the failure of the purchaser to make payment of any installment of the purchase price, he may not retake and appropriate the property, and also recover the unpaid installments of the purchase price; but his remedy is in the alternative, unless the contrary is so clearly provided as to leave no reasonable doubt that such was the intention of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1418-1438.]

4. SAME—CONSTRUCTION OF CONTRACT.

The owner of land on which there were dumps of slag and smelter products entered into a contract denominated a "lease," by which he purported to lease the land for a stated term, with the right to remove the dumps on payment of a series of notes maturing at intervals through a portion of the term. The contract provided, in effect, that removal of the dumps should proceed only in proportion as payments were made, that when all the dumps were removed the lease should terminate, and that on payment of all the notes on or before maturity the lessee should be entitled to a bill of sale of the dumps, with the right to remove the same within a specified term. It further provided that: "It is mutually agreed that all work on the said above described slag, slag dumps and materials and smelter products shall be performed in a thoroughly workmanlike manner, and that any failure of the said party of the first part to do or keep any of the agreements herein, * * * or any failure to pay immediately when due any one or more of said 100 promissory notes, * * * shall work a forfeiture of all rights of the said party of the first part under this agreement, and the said party of the second part shall have the right * * * to declare each and every one and all of the said 100 promissory notes, or whatever number of the said notes may remain unpaid, * * * immediately due and payable, and * * * to collect the same, * * * and in case of forfeiture as aforesaid all work done and money expended by the said party of the first part shall inure to the party of the second part as liquidated damages, * * * and the said party * * * may thereupon * * * enter upon said premises and dispossess all persons occupying the same." *Held*, that such transaction was not a lease, but a conditional sale of the material in the dumps, which gave the owner alternative remedies for breach of the contract, and that, where he declared a forfeiture and took possession because of default in payment of notes, he could not also collect the notes maturing thereafter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1327-1331, 1431.]

5. CONTRACTS—CONSTRUCTION—SUBSTITUTING "OR" FOR "AND."

To prevent an absurd or unreasonable result, the word "and," used in a contract, may be read "or," or vice versa.

Sanborn, Circuit Judge, holds that the contract gave the seller the right to collect the entire purchase price, and also to retake and hold the property sold, but concurs in the result on the ground that such provision was so unconscionable that it would not be enforced by a court of equity or bankruptcy.

Appeal from the District Court of the United States for the District of Colorado.

On the 23d day of March, 1905, an agreement in writing was entered into between the Independence Smelting & Refining Company, a corporation of Colorado, as party of the first part, and Adolph J. Jarmuth, of Denver, as party of the second part, the essential parts of which contract are as follows:

"That the said party of the second part, for and in consideration of the sum of one dollar to him in hand paid by the said party of the first part, the receipt whereof is hereby acknowledged, and for and in consideration of the further sum of forty-nine thousand and nine hundred and fifty ($49,950) dol-

Digitized by Google

lars, to be paid according to the tenor of one hundred (100) certain promissory notes made by the said party of the first part to the said party of the second part, each of the said notes being of even date herewith, and each of said notes being for the principal sum of five hundred ($500) dollars, except that certain promissory (note) falling due the 28th day of January, 1907, which shall be for the principal sum of four hundred and fifty ($450) dollars, and for and in consideration of the agreements and undertakings of said party of the first part herein expressed, has demised and let unto said party of the first part, for the purpose of taking and using, for a term of five years and no longer, commencing March 28, A. D. 1905, and ending March 28, 1910, all the slag, slag dumps and all materials and smelter products, belonging to said first party, situated upon the following described land at Golden, Jefferson County, Colorado: [Here follows a description of the land by metes and bounds]; being the slag, slag dumps and all materials and smelter products situated about three thousand (3,000) feet southwesterly from the smelter now operated by said first party.

"And the second party, for the consideration named herein, hereby grants to said first party, its agents and employees, free access to said slag, slag dumps and all materials and smelter products upon said land, and full and free right of way over, upon and across said land at any and all parts thereof, for wagons and wagon roads, tramways and tramway tracks, railways and railway tracks, aerial tramways, pole lines and bucket lines during the term of this lease, for the purpose only of loading, taking out and carrying away said slag, slag dumps and all materials and smelter products in accordance with the terms and objects of this agreement, provided, however, that this lease shall terminate as soon as all the slag, slag dumps and all materials and smelter products shall have been removed from said land, whether the said five years shall have expired or not."

Provisions reserving right of access in party of second part.

Further provision regarding the method of working and removing the slag and smelter products, in blocks of 100 feet parallel with the tracks of the Colorado & Southern Railway.

Provision as to the payment of the notes consecutively, and, after May 8, 1905, within six weeks after maturity, with interest after maturity at 1 per cent. per month, "providing no slag, slag dumps or other materials or smelter products shall be removed from said land by said first party after any of the said notes are past due one week and unpaid"; with the further agreement that, if the first party desires an extension of any note, written notice shall be served upon the second party by registered letter or in person, before the maturity of such note.

Then a provision regarding the discount of any one or more of the notes, by payment before maturity.

"It is mutually agreed that all work on the said above described slag, slag dumps and materials and smelter products shall be performed in a thoroughly workmanlike manner, and that any failure of the said party of the first part to do or to keep any of the agreements herein, including the above described agreement to work said slag dumps in blocks of one hundred (100) feet, or any failure to pay immediately when due any one or more of the said one hundred (100) promissory notes maturing on or before the 8th day of May, 1905, or failure to pay the rest of said one hundred (100) promissory notes within six weeks after the same becomes due according to the tenor of the same, provided notice of extension, as aforesaid, shall have been given, or the taking or using of more than five hundred (500) tons per week of and from the said slag dumps as hereinafter provided while any (one) or more of the said one hundred (100) notes shall remain unpaid, shall work a forfeiture of all rights of the said party of the first part under this agreement, and the said party of the second part shall have the right, on giving a three days' written notice to the said party of the first part to declare each and every one, and all of the said one hundred (100) promissory notes, or whatever number of the said notes may remain unpaid, given to pay for the within lease, immediately due and payable, and shall have the right, immediately, to collect the same from the said party of the first part and in case of forfeiture as aforesaid, all work done and money expended by the said party of the first part shall inure to the benefit of the said

Digitized by Google

party of the second part as liquidated damages for the failure of the said party of the first part to keep the agreements in this writing; and the said party of the second part, or his agent, may thereupon, with or without demand of possession in writing, enter upon said premises and dispossess all persons occupying the same, with or without force, and with or without process of law, or, at the option of said party of the second part, the said party of the first part, its officers or agents, and all persons found in occupation, may be proceeded against as guilty of unlawful detainer."

Provision that in case of forfeiture the first party shall have 15 days thereafter to remove improvements, etc., placed by it upon said land for the purpose of the lease.

Provision that in case the first party shall be unable to carry out said contract by reason of acts of God, accidents, strikes, fire or causes beyond the control of the first party, affecting the smelter plant at Golden operated by it, the times for the maturity and payment of said notes shall be extended for a period not exceeding 90 days in the aggregate, "provided, however, that said first party shall not remove or take away from said land any of said slag, slag dumps or other materials or smelter products hereby leased during the time in which the said notes shall be extended as aforesaid."

"And in consideration of the acceptance of the foregoing lease and the expenditures to be made hereunder, and the well and faithful keeping of the covenants hereof, the said party of the first part shall have the right to purchase the said slag, slag dumps and other materials and smelter products by the payment, on or before the said 28th day of January, A. D. 1907, to the said party of the second part, in addition to the payment of all of the aforesaid one hundred (100) promissory notes, aggregating the payment of said sum of forty-nine thousand nine hundred and fifty ($49,950) dollars, part consideration, as aforesaid, of the within lease, of the further sum of fifty ($50) dollars.

"And the said party of the second part shall, at the time of the signing of the within lease and bond, make and execute unto the said party of the first part a good and sufficient bill of sale to all the hereinabove described slag, slag dumps and other materials and smelter products situated on the said above described land, which said bill of sale shall give said first party until the 28th day of March, 1910, to remove said slag, slag dumps and all materials and smelter products, and shall be deposited, together with a copy of this agreement, in the United States National Bank, in the city and county of Denver, state of Colorado, in escrow, to be delivered to the said party of the first part, or its assigns, on the payment in full of the aforesaid notes and said sum of fifty ($50) dollars, on or before the 28th day of January, 1907, as evidenced to the United States National Bank by the presentation of the said one hundred (100) notes cancelled."

Provision regarding the execution to the second party by the first party of said 100 notes; the first falling due on or before Monday, March 6, 1905, and the others each succeeding Monday thereafter, for 100 weeks, each of said notes to be for $500, except the note falling due on or before January 28, 1907, which shall be for $450, and each of said notes bearing no interest, except at 1 per cent. per month after maturity.

Memorandum of fact that the first party has, prior to the signing of the agreement, already used about 1,000 tons of slag from said slag dump, without payment; and that only in the event of forfeiture of all rights under the agreement shall the second party be entitled to compensation for said slag.

"It is further understood and agreed by and between the parties hereto that the said party of the first part, while any one or more of the said one hundred (100) promissory notes shall remain unpaid, shall not take or use more than at the rate of five hundred (500) tons per week of and from the said slag, slag dumps and other materials and smelter products."

Provision that time is of the essence of the agreement, and the covenants to bind the heirs, executors, administrators, successors, and assigns of the parties.

After the execution of said contract, the said company took possession of said dump and proceeded to remove about 3,867 tons thereof, and paid to the said Jarmuth the sum of $4,500, represented by the first notes. The purchase

Digitized by Google

price of the dump being about $1 per ton, the company more than fully paid for the amount removed.

On May 12, 1905, Jarmuth notified the said company, in writing, that they had failed to pay, when due, the promissory note for the sum of $500 maturing on the 8th day of May, 1905; and that within three days after the service of the written notice, according to the provisions of the contract, he would declare all of the 100 promissory notes referred to in the agreement, given to pay for the lease, remaining unpaid, immediately due and payable. And thereafter, on the 17th day of May, 1905, he gave to the company written notice of the failure to pay the note as aforesaid, and of the giving of the notice of May 12, 1905, and declared each and every one of said promissory notes "given to pay for the said lease, and now remaining unpaid, immediately due and payable, and you are hereby further notified that I do hold you liable to and for all the obligations, forfeitures and liquidated damages mentioned in said agreement of lease, etc., of date March 23, 1905." Shortly thereafter the said Jarmuth re-entered and took possession of said property and appropriated the same to his use and benefit.

On August 18, 1905, the said company was adjudged a bankrupt in the United States District Court for the District of Colorado. On September 5, 1905, the appellant, William O. Manson, presented for allowance against the estate in bankruptcy a claim for the sum of $44,450, based on 89 of the unpaid promissory notes in the sum of $500 each, except one for $450; and the said Jarmuth presented for allowance against the estate one of said unpaid promissory notes for the sum of $500. The consideration recited in Manson's proof of claim for the execution of the notes was that he had sold to said Jarmuth certain real estate and personal property in Jefferson county, Colo., in return for said 89 promissory notes and others executed by the Independent Smelting & Refining Company under date of March 23, 1905, prior to the bankruptcy, which were delivered to said Jarmuth in return for an agreement of five years' lease and bond of the same date, for "all the slag, slag dumps, and all materials and smelter products." The consideration for Jarmuth's note was alleged to be cash paid for said note to said Manson; the facts being that said Manson was the real party in interest in the contract respecting the sale of said dump or slag to said company—Jarmuth having rather a representative interest than a real one.

The referee disallowed these claims, on the principal ground that the vendor or lessor, whatever he may be termed, after re-entry and reclaiming the slag, which was the consideration for the notes, was not entitled also to collect the full amount of the purchase money. This finding of the referee was, on review, affirmed by the District Court. To reverse these judgments the said claimants have prosecuted separate appeals. As the cases depend upon the same facts and principles of law, they will be disposed of in one opinion.

Edward P. Costigan (Horace N. Hawkins, on the brief), for appellants.

Daniel B. Ellis and Jesse H. Sherman (Henry T. Rogers, Lucius M. Cuthbert, Lewis B. Johnson, and Charles A. Stokes, on the briefs), for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

On the hearing of the claims before the referee in bankruptcy, there was considerable testimony offered respecting the negotiations between the parties preceding the execution of the written agreement in question. The settled rule of law is that all bargainings, proposals, and counter proposals of the parties preceding and leading up to the execution of the written contract are conclusively presumed to be expressed

Digitized by Google

in the written instrument. Any and all matters discussed between them, or their understandings not contained in the writing, are presumed to have been abandoned or changed in the ultimate expression of the minds of the parties. Therefore the terms of the contract, in the absence of fraud or mistake, cannot be varied or controlled by any antecedent negotiations or declarations in pais. It is the concensus of the best considered cases that in the adjustment of private, reciprocal rights, where the parties have deliberately put to writing their mutual convention, such expression of their intention and understanding is final and exclusive. Tait's Evidence, 326, 327; 1 Greenleaf on Evidence, § 275; Bast v. Bank, 101 U. S. 96, 25 L. Ed. 794; Pearson v. Carson, 69 Mo. 550; State ex rel. Yeoman v. Hoshaw, 98 Mo. 358, 11 S. W. 759; Tracy v. Union Iron Works Company, 104 Mo. 193, 16 S. W. 203.

It, therefore, only remains to determine what is the true import of the terms employed by the parties in the written contract in question. The claimant, William O. Manson, was interested in a large quantity of slag, dumped from an ore smelter or mill, which he desired to sell, and which the Independent Smelting & Refining Company wished to buy. Adolph J. Jarmuth seems to have been but a dummy for Manson in the transaction. After much dallying in the negotiations, the sale or transfer took the final form of said written agreement.

Question is made as to whether this slag or dump was regarded by the parties as real or personal property. It may be conceded that material of this character, dug from the earth and deposited on the surface thereof, adheres to and becomes appurtenant to the land, and ordinarily belongs to the owner of the fee; but it is equally the law that the owner of material like slag, the refuse of mineral deposit dug from the earth, run through a mill, and then dumped on the surface of contiguous land, may be treated and dealt with as mere personalty, which the owner may sell and deliver as any other personal property susceptible of manual delivery.

"Though there is no actual physical severance, articles and structures which have become part of the realty by annexation may be made to resume their character of personalty by acts of the landowner alone, or in conjunction with others, which will be effective at least as between the parties to the transaction. A severance may be brought about by the treatment of articles annexed as personalty by the persons interested therein." 13 Am. & Eng. Enc. of L. (2d Ed.) p. 616.

There is no estate or right of any kind conveyed or conceded to the realty upon which the slag was deposited, except a right of way for the purpose only of loading, taking out, and carrying away the slag.

It is not essential, where the article is to be removed by the purchaser, that the sale should be evidenced by deed of conveyance, and so the parties to this transaction regarded and treated the slag. It was provided in the contract that simultaneously with the execution of the contract the party of the second part should "make and execute unto the said party of the first part a good and sufficient bill of sale to all the described slag, slag dumps, and materials and smelter products situated on said above-described land, which said bill of sale shall give

Digitized by Google

said first party until the 28th day of March, 1910, to remove said slag, slag dumps, and all materials and smelter products, and shall be deposited together with a copy of this agreement in the United States National Bank * * * in escrow, to be delivered to the said party of the first part, or its assigns, on the payment in full of the aforesaid notes," etc.

It matters little what name parties to such contracts may give the transaction. Mere names are often insignificant; sometimes they are not even descriptive. The words "bond and lease" have become so stereotyped in contracts in Colorado, touching mines and mining material, that they are at times employed where they have no relation to the proper legal significance of the terms. To call a simple unsealed contract a "bond" does not make it a bond. To call a contract a "lease," which has for its underlying purpose the sale of property on specified conditions, intended to secure the payment of the purchase money and for the better protection of the vendor in case of reclamation of the property, does not create a lease. Nor does calling the installment payments therefor, "rent," create the relation of landlord and tenant between the parties. The amount of purchase money in this case was named in round numbers, and, if on the day of the execution of the contract the conditional purchaser had tendered the whole contract price, the property would have passed to it beyond the power of the vendor to revoke. The only remaining obligation of the purchaser, then, would have been to remove the slag within the specified time.

This transaction was not a lease, for the reasons: (1) The deferred payments did not cover the entire period of occupancy for the removal of the slag; (2) the contract gave the company the right not only to remove, but to absolutely consume, the slag, if only it paid its notes, without any provision for the return of the slag at the end of the so-called term; and (3) the time of occupancy of the premises was to end when all the slag should be removed.

In Hervey v. R. I. Locomotive Works, 93 U. S. 664, 672, 23 L. Ed. 1003, the court, in discussing a transaction respecting the transfer of personal property to be paid for in installments, retaining the title by the vendor until the payments were made, said:

> "Nor is the transaction changed by the agreement assuming the form of a lease. In determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties."

Then referring to the case of the sale of a piano, reported in Murch v. Wright, 46 Ill. 488, 95 Am. Dec. 455, the court said:

> "The court held 'that it was a mere subterfuge to call this transaction a lease,' and that it was a conditional sale, with the right of rescission on the part of the vendor, in case the purchaser should fail in payment of his installments. * * * It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid are for rent; but this form was used to cover the real transaction."

In Contracting & Building Co. of Kentucky v. Continental Trust Co. of New York, 108 Fed. 1, 47 C. C. A. 143, locomotives were delivered to a railroad company on payment of a specific amount and the execution to the builders of 12 promissory obligations, called in the

Digitized by Google

contract "lease warrants," maturing at intervals of one month up to a specified date. The written instrument was in the form of a lease, in which the installment payments were called "rentals," with the legal title retained in the so-called lessor. The contract further provided that on the payment of the last lease warrant the lessee might, at its option, purchase the locomotives for $1, on the payment of which the lessor was to execute a bill of sale therefor to the lessee. Judge Lurton observed of that:

"It is too obvious for discussion that the arrangement under which the railroad company acquired the 10 locomotives in question was no ordinary letting of property for a fixed rental, and that no such thing was really contemplated, and that the retention of title was intended as a mere mode of securing the payment of the purchase price. The real character of such transactions has been often the subject of judicial construction, and their rank in relation to the claim of creditors considered with reference to the registry laws of the states within which the property is situated. [Citing authorities.] The real transaction was a bargain and sale; the title being retained as security for the purchase money. Being property susceptible of separate ownership and separate liens, it passed under the after-acquired property clause of the existing mortgage, subject to the lien of the vendor," etc.

In Unitype Company v. Long, 143 Fed. 315, 74 C. C. A. 453, the contract was in the form of a lease of a machine for the term of three years, for a total rental of $1,260, payable in monthly installments, for which notes were given, with an option to the lessee to extend two years more at the same rental and to buy the machine at any time during the three years for $1,700, less the amount paid in rental. It was held to be nothing more than a conditional sale of the machine. The court said:

"Although called a lease, the transaction was intended to be, and in effect was, a conditional sale; the vendor reserving the title until the final payment should be made, and the right of rescission, in case the purchaser should fail in the payment of any installments of the so-called rent, or an additional amount to make the total sum $1,700."

The same view of such transaction obtains in the state of Colorado. Gerow v. Costello, 11 Colo. 561, 19 Pac. 505, 7 Am. St. Rep. 260.

It is the universally recognized rule of law, instinct with the spirit of justice, that where a right to reclaim property conditionally sold is reserved to the vendor in the event of the failure of the vendee to make payment of any installment due on the purchase price, he may not retake and appropriate the property and also recover the whole purchase price; and the retaking of the property by the seller defeats his right to recover unpaid installments. "A vendor under a conditional sale cannot have both the property and the purchase price. Where he has elected to retake the property absolutely, the consideration for the obligations or security given for the purchase price fails, and he can neither collect upon the one nor enforce payment of the other." White v. A. W. Gray's Sons, 89 N. Y. Supp. 481.

In Seanor v. McLaughlin, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467, the plaintiff delivered to the defendant certain machines, the price of which was $1,700, retaining the title. On payment of $750 the agreement was to pay the balance in three yearly payments. The contract provided that the plaintiff could resume possession of the machines

Digitized by Google

on default, and for that purpose enter the defendant's premises. The defendants concurrently therewith gave the plaintiff a judgment bond for $1,000 for such installments, as collateral to secure the rentals for machines leased by the obligors from the obligees. It was held that on default the plaintiffs might take judgment and collect by execution, or rescind the contract and resume possession; but they could not adopt both remedies. The court said:

"The contract was to pass the possession of the machine to the defendant, and to make secure the payment of its value to the plaintiffs. Its value, as fixed by both parties, was $1,700. It is fair to presume the plaintiffs intended by the contract to get this sum once, and that the defendant did not intend to pay it, or any part of it, twice. Parties may, in contracting, provide penalties for nonperformance; but, unless they do so in unmistakable language, courts will not insert them."

After reviewing the provisions of the contract, the court further said:

"The plaintiffs had two distinct remedies, either of which they might adopt to enforce their right. They parted with the possession of the machine at the price of $1,700; $750 of this to be paid in hand, which they received. They still retained title, with the right to resume possession on default in either payment of $316.67; but, the subject of the contract being a movable chattel, and its security being, at best, little more than a chattel mortgage, they took a personal judgment bond, with power of attorney to enter it and confess judgment in any court of record. * * * Either remedy was complete in itself, and the plaintiffs, on default, could adopt either; but they were not cumulative—they could not adopt both—unless it was plainly expressed in the contract, or a necessary implication from its terms. * * * On default of payment, the plaintiffs were not bound to accept the machine or take possession of it. They could have entered judgment on the bond, levied on the machine and any other property of defendant, in satisfaction of their demand. But they rescinded the contract by retaking into their possession the subject of it, which they had a right to do, and then immediately entered their bond and issued execution to levy on other property of defendant, which they had no right to do, for the contract or obligation to which the bond was collateral no longer existed."

In Minneapolis Harvester Works v. Hally, 27 Minn. 495, 8 N. W. 597, the harvester works made a sale of machinery, taking therefor a promissory note for $240, bearing 12 per cent. interest per annum; the written contract containing a condition that the ownership and right of possession should not pass from the harvester company until the note and interest were paid in full. "And the said Minneapolis Harvester Works, or their authorized agents, are hereby fully authorized and empowered to proceed to collect the same at any time they may reasonably deem themselves insecure, and, even before the maturity thereof, may take possession of said machine, sell the same, and apply the proceeds towards the payment of this note, after paying all costs and necessary expenses; also this note to become due upon the removal of its maker from the county wherein he now resides." The vendor afterwards took possession of the machine from the defendant. The court said:

"It appears from the undisputed evidence on both sides that the machines have been taken from the possession of the defendant by the plaintiff and sold. The result is that there is a total failure of the consideration expressed in the instrument. The case is one of a conditional sale; that is to say, of a

Digitized by Google

transaction which was to take effect as a sale, so as to pass the title of the reapers and the right of possession upon payment therefor, and not otherwise. The defendant not only never acquired any title, ownership, or right of possession of the machines but he has by the act of the plaintiff been deprived of the power of acquiring any by paying the price specified in the instrument."

See, also, Moultrie Repair Company v. Hill, 120 Ga. 730, 48 S. E. 143; Turk v. Carnahan, 25 Ind. App. 125, 57 N. E. 729, 81 Am. St. Rep. 85; Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 Pac. 435.

The foregoing rule applies with equal rigor to contracts of lease. If the lessor enter for condition broken, and resume possession of the premises, he cannot hold the premises and collect accruing rent, for the reason that the use of the property is the sole consideration for the obligation to pay. He cannot have both, for he is not entitled to be twice paid. Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719.

It is not contended that parties who are sui juris, competent to contract, may not confer upon the vendor or lessor the double remedy for failure to pay; but the assertion of such cumulative right is so harsh, oppressive, and unjust that courts will never recognize and enforce it, unless it is so clearly nominated in the bond as to leave no reasonable doubt that such was the intention of the parties.

Turning to the provisions of the written agreement under review, it is to be observed that the first requirement was that the work on the slag dump was to be performed in a thoroughly workmanlike manner. This was inserted evidently for the better protection of the vendor in the event of the failure of the vendee to pay the installment notes, so that if the vendor had to reclaim the property as little injury as possible would be done thereto by the manner of its use. This is followed by the provision:

"That any failure of the said party of the first part to do or to keep any of the agreements herein, including the above described agreement to work said slag dumps in blocks of one hundred (100) feet, or any failure to pay immediately when due any one or more of the said one hundred (100) promissory notes maturing on or before the said 8th day of May, 1905, or failure to pay the rest of said one hundred (100) promissory notes within six weeks after the same becomes due according to the tenor of the same, provided notice of extension, as aforesaid, shall have been given or the taking or using of more than five hundred (500) tons per week of and from the said slag dumps as hereinafter provided while any one or more of the said one hundred (100) notes shall remain unpaid shall work a forfeiture of all rights of the said party of the first part under this agreement."

The meaning and purpose of this was that on failure to do the given acts the purchaser's right to hold and remove the dump would be gone. This then is followed by the provision that:

"Said party of the second part shall have the right, on giving three days' written notice to the said party of the first part, to declare each and every one, and all of the said 100 promissory notes, or whatever number of said notes may remain unpaid, given to pay for the within lease, immediately due and payable, and shall have the right, immediately, to collect the same."

Here is a single provision respecting the right to mature all the notes in case of default in the payment of one, with a right to immediately collect the same. It is a complete remedy within and of itself.

Digitized by Google

There are two noticeable facts in the foregoing provisions: (1) It is expressly stated that the notes to be matured were "given to pay for the within lease" (that is, for the right to remove and appropriate the slag) and, therefore, if immediately collected, the slag, which constituted the consideration for the notes, would belong to the payor; and (2) it is expressly declared that the work done and money already paid should be forfeited as liquidated damages. On the maxim "Expressum facit cessare tacitum," the idea of treating the whole purchase price as liquidated damages is excluded. This becomes obvious by the provision authorizing a re-entry being immediately preceded by the conjunction "and," coupling it with the forfeiture as aforesaid, of all work done and money paid as liquidated damages.

It is an ordinary provision in contracts of conditional sales, where the vendee shall have made some preliminary payment, and should fail to meet the balance as required, to declare that what has been paid shall be forfeited to the vendor as liquidated damages, and is not inconsistent with the additional right of reclamation.

Indeed, this provision in the contract respecting the forfeiture of work done and money paid is but expressive of the general rule of law that the purchaser in default will not be permitted to "both withhold the purchase money and keep possession and enjoy the rents and profits of the estate; nor will it subject the vendor to the return of the purchase money if he is obliged to go into a court of equity to be restored to the possession." Hansbrough v. Peck, 5 Wall. 497, 505, 18 L. Ed. 520. In this case the court holds that, in default of the payments of the installments of purchase money, the vendor has two remedies: (1) he may sue upon the contract and recover judgment for the purchase money, and may levy execution upon any property of the defendant, including the property sold; or he may bring an action for the recovery of possession; or he may go into a court of equity in the first instance and call on the purchaser to pay the money due, and thereafter be foreclosed from setting up any claim to the property. "And no rule in respect to the contract is better settled than this: That the party who has advanced money, or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done."

In the case at bar the installments to be paid would not greatly exceed the quantity of slag removed, and, as the value of the work done preparatory to its removal might be difficult of ascertainment, it was reasonably declared that these should be forfeited as liquidated damages in case of re-entry and retaking. As these were the only matters to be forfeited as liquidated damages, the idea is precluded that the residue of the purchase money could be also claimed to be forfeited as liquidated damages in case of re-entry. Such a construction of the contract would be so incongruous and oppressive that courts, consistent with the expression, would, if possible, so construe the whole contract as to harmonize all its parts and avoid inconsistencies, harsh and oppressive results.

Digitized by Google

Among the rules of construction to prevent incongruities and absurdities is that the word "and" may be read "or," and vice versa, as "these words are said to be convertible with each other as the sense of the enactment (or contract) and the necessity of harmonizing its provisions may require." Endlich on Interpretation of Statutes, § 303. This rule is predicated of the assumption that it could not have been intended to produce absurd and unreasonable results; "and consequently, when such effects would follow a literal construction of the statute, the conjunctive particle may be read as disjunctive, or vice versa, on the theory that the word to be corrected was inserted by inadvertence or clerical error." See, also, Thomas v. Grand Junction, 13 Colo. App. 80, 84, 85, 56 Pac. 665; Kitchen v. Southern Railway Company, 68 S. C. 554, 48 S. E. 4.

From the contract as a whole, it is manifest to our minds that it could not have been the purpose of both parties to the contract that the right to collect the entire purchase money was given in addition to the right to re-enter and retake the property which constituted the consideration for the notes. This unreasonable, absurd, and confiscatory result is avoided, under the foregoing rule, by substituting the word "or" for "and," which occurs immediately after the words "shall work a forfeiture of all rights of the said party of the first part under this agreement," so as to make the provision of the contract in question read as follows:

"It is mutually agreed that all work on the said above described slag, slag dumps and materials and smelter products shall be performed in a thoroughly workmanlike manner, and that any failure of the said party of the first part to do or to keep any of the agreements herein, including the above described agreement to work said slag dumps in blocks of one hundred (100) feet, or any failure to pay immediately when due any one or more of the said one hundred (100) promissory notes maturing on or before the 8th day of May, 1905, or failure to pay the rest of said one hundred (100) promissory notes within six weeks after the same becomes due according to the tenor of the same, provided notice of extension, as aforesaid, shall have been given, or the taking or using of more than five hundred (500) tons per week of and from the said slag dumps as hereinafter provided while any one or more of the said one hundred (100) notes shall remain unpaid, shall work a forfeiture of all rights of the said party of the first part under this agreement, or (the other alternative provision) the said party of the second part shall have the right, on giving a three days' written notice to the said party of the first part, to declare each and every one, and all of the said one hundred (100) promissory notes, or whatever number of the said notes may remain unpaid, given to pay for the within lease, immediately due and payable, and shall have the right, immediately, to collect the same from the said party of the first part, and in case of forfeiture as aforesaid (that is, if the alternative forfeiture requiring an immediate collection of the remaining notes is chosen), all work done and money expended by the said party of the first part shall inure to the benefit of the said party of the second part as liquidated damages for the failure of the said party of the first part to keep the agreements in this writing; and the said party of the second part, or his agent, may thereupon, with or without demand of possession in writing, enter upon said premises and dispossess all persons occupying the same, with or without force, and with or without process of law, or, at the option of said party of the second part, the said party of the first part, its officers or agents, and all persons found in occupation, may be proceeded against as guilty of unlawful detainer."

Had it been intended that the vendor should be entitled to a forfeiture and also to collect the remaining notes, the natural and easy

Digitized by Google

way to have expressed such purpose would have been, just as in the case of work done and money expended, by saying the notes should be immediately collected as liquidated damages; or by some other apt expression, as by saying that such re-entry shall not work a forfeiture of the right to collect the unpaid purchase money as aforesaid, or the like.

The case of Grommes v. St. Paul Trust Company, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248, cited by appellants' counsel, aptly illustrates the distinction under discussion. That was an ordinary lease of a building for a given term at a fixed monthly rental, containing the following express provision:

"It is further agreed by and between the parties hereto that should said party of the second part fail to make the above mentioned payments as herein specified, or to pay any of the rent aforesaid, when due, or shall fail to fulfill any of the covenants herein contained, then and in that case, it shall be lawful for the said party of the first part to re-enter and take full and absolute possession of the above rented premises, and to hold and enjoy the same fully and absolutely, without such re-entry working a forfeiture of the rents to be paid and the covenants to be performed by the said party of the second part, or any of the same, during the full term of this lease."

The court, after discussing the rule that such re-entry would extinguish the future rental, observed that "such cases are distinguishable from the case at bar in that here the lease, which is signed by the tenant, and under the terms of which he entered into possession of the demised premises, provides that the re-entry by the landlord shall not work a forfeiture of the rents to be paid after such re-entry." As in that case the lessor had relet the premises after the resumption of possession, the court said:

"The provision does not contemplate the collection of double rent, but the rent due from the original lessee is to be credited with such rent as is realized from the reletting. The lessor is entitled to such sum as shall be equal to rents required by the terms of the lease to be paid during the full term, and not to any greater sum."

There is no provision in the agreement at bar that in the event of default Jarmuth might take possession of the slag as the agent for the benefit of the company, or that he might relet the same. On the contrary, the evidence is that he disposed of the same absolutely.

The case of Lamson Consol. Store Service Company v. Bowland, 114 Fed. 639, 52 C. C. A. 335, is quite pertinent. The lease was of a store service apparatus, reserving a stipulated annual rental, payable quarterly in advance. It provided that, if any installment remained unpaid for 90 days, the rental for the entire term should become at once due. It declared that the lessee should make no alterations in the mechanism, or remove the apparatus, or use it elsewhere than in the store. The agreement concluded as follows:

"That in case of a breach of any of the covenants or agreements to be observed on the part of the lessee, or attached by process of law, by proceedings in bankruptcy, or insolvency, or otherwise, the lessor may enter and take possession of the system. * * * No removal of said system made by the lessor during the term on account of any determination of the lessee's tenancy, or on account of any default by the lessee, shall constitute a surrender of the lease."

Digitized by Google

The day before a certain installment of rent became due, a petition in involuntary bankruptcy was filed against the lessees, and they were adjudged bankrupt. The installment falling due the day next after the filing of the petition in bankruptcy was not paid in full, and the lessors retook possession. It was held that the resumption of possession for any reason other than termination of the lessees' tenancy prevented the lessor from collecting future rents. The court said:

"The lessors invoke the third clause of the lease contract, which provides that: 'If any installment of said rental shall remain unpaid for sixty days after it becomes due, the entire rental to the end of the lease shall become at once due and payable.' It is entirely competent to contract that the consequence of a default in the payment of an installment of interest for the use of money, or of rent for the use of property, shall be the precipitancy of the maturity of the principal of the money loaned, or of future installments for the rental of the property in respect to which default has been made. Rent is the compensation for the use and enjoyment of the thing rented, and is ordinarily demandable whether the tenant actually enjoy the use and possession of the subject of the rent or not, unless the failure is due to some fault of the letter. But in this case the letter demands that the lessee shall continue to pay rent, although it has repossessed itself of the thing for the enjoyment of which the rent is to be paid. The resumption of possession by the lessor operates as a surrender of the lease, and puts an end to the liability of the lessee for future rents, unless otherwise provided. A covenant in a lease authorizing a landlord, on default of rent, to take possession, and relet, if possible, for the benefit of the tenant, and that in such case the tenant shall remain liable for the deficiency, or for the whole rent if a reletting is impossible, has been held valid. In case of a covenant such as that just mentioned, the lessor's possession would be as agent for the lessee; and the liability of the lessee would be contingent upon a deficiency, and clearly not such a fixed and absolute liability as would be provable in bankruptcy. In the lease here under consideration, the lessor has reserved the right to resume possession in quite a number of contingencies, the effect of which the contract declares shall be to 'determine all right and interest the said lessee may have in said system.' Without more, it cannot be that the lessee shall be liable for the future rents, when the effect of the act of the lessor has been to determine all his right and interest in the subject of the lease. Forfeitures are never favored, and when it is claimed that the lessor of property may resume possession of the subject-matter of the lease, and continue to hold the lessee liable for future rents, although deprived of the use and enjoyment of the thing leased, the terms of the bond must be exceedingly plain. Liability under such circumstances for future rents would be in the nature of a penalty, and the covenant by which the lessor may have both the use of the thing rented, and the compensation which the lessee was to pay for its use, must be so specific as that no other reasonable interpretation can be placed upon it."

It is a noticeable fact that, in the petition for the allowance of the claims in question against the bankrupt estate, there was a singular omission in stating what was the consideration of the notes sought to be allowed against the estate, as required by the bankrupt law; the petitioner contenting himself with stating that the consideration was for the transfer of the notes to him by Jarmuth. The palpable reason for this omission in the statement of his case was that he would have had to disclose that the consideration for the notes as between the original parties was the right to remove and use the slag dumps. The evidence in this case shows that the notes paid by the vendee, up to the time of the forfeiture, fully covered all the slag removed, and the petitioners' evidence tended to show that the slag in the dump was actually worth more than the contract price; and, yet, while the vendor

Digitized by Google

took back and appropriated the entire remaining property, thereby taking away from the vendee and its creditors the very means of paying the notes given therefor, the petitioners come into a court of bankruptcy to have allowed against the estate the entire unpaid contract price, amounting to about $45,000.

In our judgment the right to such extraordinary exaction is not clearly so nominated in the bond, and the decree of the District Court in disallowing the claims should therefore be affirmed.

It is accordingly so ordered.

SANBORN, Circuit Judge (concurring). In my opinion the contract here in question evidences a conditional sale wherein the parties intended to agree, and did agree, that upon default in payment of any of the installments the vendor might collect the entire purchase price and might also retake and hold the property sold. It is only by a change in the decisive word of the agreement which seems to me to make the contract mean the very opposite of what the parties intended and clearly expressed and by an extended argument that a different construction is justified. I am content to take the agreement as the parties made and executed it without change. But such a contract is so unconscionable that it may not be enforced in equity, and a proceeding in bankruptcy is a proceeding in equity. In such a contract the vendor has the option to retake the property sold, to keep the payments already made, and to abandon collection of the future installments, or to keep the payments already made, to enforce the collection of the future installments by the sale of the property which he has taken back on the theory that it is security for the payment of the installments, to apply the proceeds to their payment and collect the balance, or to leave the property sold in the possession and ownership of the vendee and to collect the entire future installments. He may not, however, retake and retain the property sold, and then recover in equity the future installments of its purchase price, because the sale of the property is the consideration of the notes given or the promise made to pay the price.

On this ground I concur in the affirmance of the decree below.

NOTE.

Distinctions Between Real and Personal Property.

I. In General.

[a] Slaves, though generally immovable by law, are movable by nature.—(La. 1851) Hyams v. Smith, 6 La. Ann. 362;
(Tenn. 1838) McCollum v. Smith, Meigs, 342, 33 Am. Dec. 147.

[b] (Colo. 1905) A water right appurtenant to real estate is real, and not personal, property.—Talcott v. Mastin, 20 Colo. App. 488, 79 Pac. 973.

[c] (Del. 1907) Real property is land, and, generally, whatever is erected or growing upon or affixed to land.—State v. Wolf, 66 Atl. 739.

[d] (Ill. 1860) Real estate embraces such things as are permanent, fixed, and immovable, and which cannot be carried out of their places, as lands and tenements, while personal property is defined to be goods, money, and all other movables which may attend the person of the owner wherever he may go.—Hunt v. Bullock, 23 Ill. (13 Peck) 320.

[e] (Iowa, 1851) Rails not in a fence are no part of the realty.—Robertson v. Phillips, 3 G. Greene, 220.

Digitized by Google

[f] (La. 1843) A railway is not an immovable by nature or destination, where the soil on which it is laid belongs to another.—State v. Mexican Gulf Co., 3 Rob. 513.

[g] (La. 1847) Though slaves are declared by Code, art. 461, to be immovables, they are not real estate.—Girard v. City of New Orleans, 2 La. Ann. 897.

[h] (Mass. 1859) Peat, dry or in process of curing on the meadow, is personal property.—Gile v. Stevens, 79 Mass. (13 Gray) 146.

[i] (Mo. 1903) A realty corporation platted an addition to a city, and to induce the sale of lots, laid water pipes in the street, which, under license from the city, were connected with the city water mains, and put in a meter at the point of junction. The corporation conveyed the several lots, together with all rights, privileges, immunities, and appurtenances to the several purchasers by general warranty deeds. By mutual understanding the water tax charged by the city for the supply for the addition was distributed among the several householders, and collected through a voluntary association of the citizens, and paid to the city. *Held*, that the meter and pipes were personalty, and title thereto passed by the bill of sale from the corporation to a third person. —Mulrooney v. Obear, 171 Mo. 613, 71 S. W. 1019.

[j] (N. C. 1857) Turpentine, run into boxes in a state to be dipped up, is personal property.—Branch v. Morrison, 50 N. C. 16, 69 Am. Dec. 770.

[k] (N. C. 1871) Crude turpentine, which has formed on the body of the tree and is usually known as "scrape," is personal property, and belongs to the person who has lawfully produced it by cultivation, being properly classed with fructus industriales.—Lewis v. McNatt, 65 N. C. 63.

[l] (Ohio, 1870) A mortgage executed by an individual member of a firm upon land, the legal title to which is invested in him, but which is in fact owned and used by the firm, is "real estate security," within the meaning of a clause in a will directing the executors to loan the money coming into his hands upon real estate security.—Miller v. Proctor, 20 Ohio St. 442.

[m] (Or. 1905) A meteorite or aerolite, though not buried in the earth, is nevertheless real estate, belonging to the owner of the land, and not personal property, in the absence of proof of severance.—Oregon Iron Co. v. Hughes, 47 Or. 313, 81 Pac. 572.

[n] (Or. 1905) Mere evidence of a tradition that Indians reverenced a meteorite, washed their faces in the water contained therein, and treated it as a kind of magic or medicine rock belonging to the medicine men of the tribe, and that there were fantastic potholes therein, thought to have been made by the Indians, was insufficient to justify an inference that they had severed the meteorite from the realty, and thereafter abandoned it, entitling defendant thereto, as the next finder.—Oregon Iron Co. v. Hughes, 47 Or. 313, 81 Pac. 572.

[o] (Wash. 1901) A water company having a franchise for 25 years to lay pipes through and under the streets of a city, and supply the inhabitants with water, having purchased pipes and mains for its plant, and laid a portion thereof, but owning no buildings or land, executed a mortgage to plaintiff, reciting that it mortgaged "the following described personal property, to wit, all its water mains, franchises," etc. The instrument was executed in proper form to be recorded as a chattel mortgage, but was not recorded in the book kept for that purpose, but in the book of real estate mortgages. The company afterwards sold all its property and franchises to another corporation, which gave a deed of trust to the defendant trustee to secure its bonds; the trustee having no actual notice of plaintiff's mortgage. *Held*, that the mains, pipes, and franchises of such company were personal property, and, the mortgage not having been recorded in a book kept exclusively for recording chattel mortgages, plaintiff's lien was subordinate to the trustee's lien under the deed of trust.—Dunsmuir v. Port Angeles Gas, Water, Electric Light & Power Co., 24 Wash. 104, 63 Pac. 1095.

II. Deeds, Claims, and Scrip.

[a] (Ind. 1861) A title deed is a personal chattel; but it is so connected with and essential to the ownership of real estate that it descends with it to the heir.—Wilson v. Rybolt, 17 Ind. 391, 79 Am. Dec. 486.

Digitized by Google

[b] (Pa. 1806) Improvement claims are regarded as chattels.—McTeer's Lessee v. Buttorff, 4 Yeates, 300.

[c] (Tex. 1860) Land scrip is treated in law as a chattel, and, unlike an ordinary title deed, has a market value.—Nelson v. King, 25 Tex. 655.

III. Church Pews.

[a] A pew in a meeting house is real estate.

—(Mass. 1813) Bates v. Sparrell, 10 Mass. 323;

(N. Y. 1836) Trustees of First Baptist Church of Ithaca v. Bigelow, 16 Wend. 28;

(Vt. 1846) Kellogg v. Dickinson, 18 Vt. 266; (1856) Hodges v. Green, 28 Vt. (2 Williams) 358; (1857) Barnard v. Whipple, 29 Vt. (3 Williams) 401, 70 Am. Dec. 422; (1861) O'Hear v. De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653.

CONTRA, see

(Pa. 1855) Church v. Wells' Ex'rs, 24 Pa. (12 Harris) 249.

[b] (La. 1871) A pew in church, being attached to the realty, is of the character of an usufruct, and must be classed as an incorporeal immovable.—Succession of Gamble, 23 La. Ann. 9.

[c] (Mass. 1821) Though property in a pew be treated as real estate, it is not subject to the same rules and principles as property in other real estate. The owner thereof does not own the soil over which the pew is built, nor the space above it; but he has exclusive right to occupy the pew, and to maintain any trespass or a writ of entry against one who disturbs him therein.—Gay v. Baker, 17 Mass. 435, 9 Am. Dec. 159.

[d] (N. H. 1827) Where a town granted to an individual the exclusive right to use a pew in their meeting house, located in the particular place, there was an implied reservation of a right to remove the meeting house to such place as would best accommodate the town.—Fisher v. Glover, 4 N. H. 180.

[e] (N. J. 1848) The right to a pew, granted by a church corporation to a man and his heirs, is real property, an incorporeal easement, or usufructuary right in land of another.—Trustees of Third Presbyterian Congregation v. Andruss, 21 N. J. Law (1 Zab.) 325.

[f] (Ohio, 1891) A pew in a building devoted to religious worship which is sold to the pew-holder is real estate, any agreement of the parties to regard it as personalty notwithstanding.—Deutsch v. Stone (Com. Pl.) 27 Wkly. Law Bul. 20.

[g] (S. C. 1824) The right to use a pew, the possession of the church being in a corporation, is an incorporeal hereditament.—White v. Marshall, Harp. 122.

IV. Buildings and Other Structures.

[a] (Alaska, 1902) The owner of a building who permits another to place it on his lot and build it into other permanent buildings does not thereby acquire an interest in the real estate, nor does he acquire a lien in equity for the value thereof. He must bring his action at law to recover its value.—Chambers v. Hannum, 1 Alaska, 468.

[b] (Ariz. 1902) A log and brush fence, set up to inclose a tract of United States government land by one having no title thereto, and partly placed, by mistake, on an adjoining tract, is a part of the realty, as between its builder and one afterwards acquiring a government deed to the adjoining tract, and the property of the latter; and its builder cannot sue for the conversion thereof, on the theory that he had the right to remove it, in analogy to the privilege of a tenant to remove trade fixtures.—Hereford v. Pusch, 68 Pac. 547.

[c] (Conn. 1848) Though the rule is that a building permanently fixed in a freehold becomes a part of it as real estate, yet, if it was erected by the builder with his own money, and for his own use, as disconnected from the use of land, and with an understanding to that effect between the owner of the land and the builder, it will be considered as personal estate.—Curtiss v. Hoyt, 19 Conn. 154, 48 Am. Dec. 149.

[d] (Me. 1857) A dam is not necessarily real estate. If built by one person on the land of another with his consent, it would be personal estate.—Southard v. Hill, 44 Me. 92, 69 Am. Dec. 85.

Digitized by Google

[e] (Mass. 1905) Icehouses built upon the land by the owner of the fee become a part of the realty, although their construction is such that, had they been put up by some one other than the owner, under an agreement to that effect, they would be personalty.—Roberts v. Lynn Ice Co., 187 Mass. 402, 73 N. E. 523.

[f] (N. H. 1861) Where dower has been set off in a farm, and a partition fence erected between the dower and the rest of the farm, and the tenancy in dower is terminated, the fence is part of the realty, and passes to the owner of the farm; he owning the reversion of dower.—Glidden v. Bennett, 43 N. H. 306.

[g] (Pa. 1835) A toll bridge made by two men across a stream between their lands, by authority of the legislature, is real estate.—In re Meason's Estate, 4 Watts, 341.

[h] (Pa. 1871) As a party wall is real estate, its transfer requires a deed. —McGittigan v. Evans, 8 Phila. 264.

V. MANURE.

[a] (N. J. 1860) Manure lying in a barnyard, where it is accumulated, is personal property; but, after it is spread on the land and appropriated to fertilizing purposes, it becomes a part of the freehold.—Ruckman v. Outwater, 28 N. J. Law (4 Dutch.) 581.

[b] (Vt.) Where manure lies on the soil where it was first deposited, it is a part of the soil, and it is considered real estate; but, when severed from the soil, gathered up, and secured for use elsewhere, it is merely a personal chattel.—(1824) Stone v. Proctor, 2 D. Chip. 108; (1870) French v. Freeman, 43 Vt. 93.

VI. TREES, CROPS, AND PLANTS.

[a] Standing trees form part of the land, and are real property.
—(Ga. 1906) Moore v. Vickers, 126 Ga. 42, 54 S. E. 814;
(Ill. 1828) Adams v. Smith, 1 Ill. (Breese) 283; (1873) Osborn v. Rabe, 67 Ill. 108;
(N. Y. 1843) McIntyre v. Barnard, 1 Sandf. Ch. 52; (1869) Goodyear v. Vosburgh, 39 How. Prac. 377;
(Wis. 1873) Strasson v. Montgomery, 32 Wis. 52.

[b] Those profits which are the spontaneous products of the earth or its permanent fruits are real estate; but the corn and other growth of the earth, which are produced annually by labor and industry, called "fructus industriales," are for most purposes regarded as personal chattels.
—(Kan. 1894) Mabry v. Harp, 53 Kan. 398, 36 Pac. 743;
(N. J. 1873) Brehen v. O'Donnell, 36 N. J. Law (7 Vroom) 257;
(N. C. 1840) Brittain v. McKay, 23 N. C. 265, 35 Am. Dec. 738; (1867) Flynt v. Conrad, 61 N. C. 190, 95 Am. Dec. 588.

[c] (Ark. 1905) Growing strawberry plants, attached to the soil, are personal property, and the subject of replevin.—Cannon v. Matthews, 75 Ark. 336, 87 S. W. 428, 69 L. R. A. 827, 112 Am. St. Rep. 64.

[d] (Fla. 1907) Growing fruit trees are considered as part of the land.—Griffing Bros. Co. v. Winfield, 43 South. 687.

[e] (Ky. 1906) Where growing timber was sold with the understanding that the purchaser should remove it from the land within a certain time, and he failed to do so, the timber did not become personal property, the sale not having been made in contemplation of immediate severance.—Bell County Land & Coal Co. v. Moss, 97 S. W. 354, 30 Ky. Law Rep. 6.

[f] (N. J. 1873) Trees, which are the natural and permanent growth of the soil, cannot be regarded as partaking of the character of emblements or "fructus industriales," but are a part of the inheritance, and can only become personalty by actual severance, or by a severance in contemplation of law as the effect of a proper instrument of writing.—Slocum v. Seymour, 36 N. J. Law (7 Vroom) 138, 13 Am. Rep. 432.

[g] (N. Y. 1845) Though grass growing is in general parcel of the realty, yet, where it is owned by one who does not also own the land, it is personal property, and may be mortgaged and sold as such.—Smith v. Jenks, 1 Denio, 580.

Digitized by Google

[h] (Tenn. 1872) A contract to sell all the timber on certain land at so much per cord, to be paid for as used, is not a sale of real property, but of personalty. —New York & E. T. Iron Co. v. Greene County Iron Co., 58 Tenn. (11 Heisk.) 434.

[i] (Vt. 1843) Standing trees may be sold by parol, and the purchaser may have the right to go upon the land to cut them, and when cut and left upon the land they become the personal property of the purchaser.—Yale v. Seely, 15 Vt. 221.

[j] (Wis. 1907) The growing timber on the premises at the testator's death was real estate owned by him, and he had an interest in so much of the soil as was necessary to sustain it.—Williams v. Jones, 111 N. W. 505.

VII. CONVERSION OR CHANGE OF FORM.

1. In General.

[a] (Ga. 1901) Where a house is destroyed by an accidental fire, and the bricks and other débris fall on the land, they still remain a part of the realty, if the owner does nothing to show an intention to sever them, and convert them again into personalty; and the owner cannot remove them from the land after a sale of the land to another, nor hold the vendee accountable for them.—Guernsey v. Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270.

[b] (Idaho, 1902) A hotel building affixed to land and conveyed with the land as real estate, cannot thereafter, by mere agreement of the parties, become personal property, and legally incumbered by a chattel mortgage without severance from the land.—Beeler v. C. C. Mercantile Co., 8 Idaho, 644, 70 Pac. 943, 60 L. R. A. 283.

[c] (Ill. 1903) The first story of a building was constructed by the owner of the land, and the next story by an opera house association. Afterwards the owner of the land conveyed to the association, by deed, all his interest in the second story, with the right to use the hallways and stairways leading thereto, together with the box office, and the ground in the rear, occupied by outhouses belonging to the building. The deed contained no reservation or limitation, and no time was stated when the right of the grantee should expire. No provision was made allowing the owner of the second story to remove it. *Held*, that the second story was real estate.—Madison v. Madison, 206 Ill. 534, 69 N. E. 625.

[d] (Me. 1875) Where stones have been sold and delivered by the owner of the land on which they are situated, and the vendee moves them to another part of the premises, they are thereby severed from the soil and become personal property.—Fulton v. Norton, 64 Me. 410.

[e] (N. H. 1883) Where a house and the materials in it are sold, with the understanding that they are to be removed within a given time, the sale effects the severance of the house and materials from the lands, and they become personal property.—Stackpole v. Eastern R. R., 62 N. H. 493.

[f] (N. Y. 1903) Where the owner of land acquires an outstanding lease of a portion of the premises for a term of years, under which a building erected thereon by the lessees is declared to be personal property, subject to the right of removal, the title to such building does not thereby merge in the fee of the land. Order (Sup. 1901) 72 N. Y. Supp. 868, reversed.—Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574.

[g] (N. C. 1876) Rails, when made up into a fence upon the land, become a part of the realty.—State v. Graves, 74 N. C. 396.

[h] (Tex. 1889) Land certificates lose the characteristics of personal property or choses in action, and become realty, after location and survey thereunder.—Groesbeck v. Bodman's Heirs, 73 Tex. 287, 11 S. W. 322.

[i] (Vt. 1885) Old rails, the refuse material of a fence which had been removed, are not a part of the realty, and can be taken away by the vacating tenant as firewood "from fallen trees, or deadwood."—Fullington v. Goodwin, 57 Vt. 641.

[j] (W. Va. 1880) To convert an article which is part of the freehold into a chattel state by severing it from the realty, the act of severance must be done by one having the authority or right to do so, and it must be severed with the intention of thus converting it into a chattel.—Lewis v. Rosler, 16 W. Va. 333.

Digitized by Google

2. Effect of Severance of Trees.

[a] Trees severed from the freehold become personal property, but the title thereto is unaffected by the change.

—(Cal. 1886) Kimball v. Lohmas, 31 Cal. 154;
(Mo. 1898) Kelley v. Vandiver, 75 Mo. App. 435;
(N. C. 1884) Wall v. Williams, 91 N. C. 477.

[b] By a sale of growing trees by deed or writing, the trees are presumed to be severed from the realty, and become chattels personal.

—(Ky. 1863) Byassee v. Reese, 61 Ky. (4 Metc.) 372, 83 Am. Dec. 481;
(N. H. 1864) Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173;
(N. Y. 1847) Warren v. Leland, 2 Barb. 613.

[c] Where the vendee of timber lands, with authority to cut timber within a certain time, cuts such timber within the time limited, the severance operates to convert the timber to personalty.

—(Mass. 1859) Douglas v. Shumway, 79 Mass. (13 Gray) 498;
(Mich. 1896) Macomber v. Detroit, L. & N. R. Co., 108 Mich. 491, 66 N. W. 376, 62 Am. St. Rep. 713, 32 L. R. A. 102;
(Wis. 1890) Hicks v. Smith, 77 Wis. 146, 46 N. W. 133.

[d] Trees, when severed from the freehold, become personal property.

—(Me. 1852) Moody v. Whitney, 34 Me. 563; (1855) Whidden v. Seelve, 40 Me. 247, 63 Am. Dec. 661;
(Nev. 1869) Peck v. Brown, 5 Nev. 81.

[e] (La. 1849) Wood cut and corded, and separated from the land when sold, is movable, and does not pass to the purchaser.—Woodruff v. Roberts, 4 La. Ann. 127.

[f] (Me. 1837) Where land is granted, reserving to the grantor the use and control of the lands granted during his natural life, trees cut by the grantor become personal property.—Richardson v. York, 14 Me. (2 Shep.) 216.

[g] (Mass. 1856) Wood and timber, cut by a tenant for life, becomes personal property.—Clark v. Holden, 73 Mass. (7 Gray) 8, 66 Am. Dec. 450.

[h] (Mich. 1891) Timber cut pursuant to a license given becomes personalty.—White v. King, 87 Mich. 107, 49 N. W. 518.

[i] (Minn. 1867) Logs cut from the land by one who is the owner of the soil thereby become personal property.—Berthold v. Holman, 12 Minn. 335 (Gil. 221), 93 Am. Dec. 233.

[j] (N. J. 1836) Timber felled by trespassers vests as personal property in the owner of the fee; but, if the person who is intrusted with the property is benefited by this change, then the severance of a part of the realty, by the felling of the timber, does not change it from real to personal property for his benefit, but it will retain the character of real property, and pass to the persons who would have taken it if unsevered.—Porch v. Fries, 18 N. J. Eq. (3 C. E. Green) 204.

[k] (Or. 1880) Where the purchaser of school lands under a certificate issued in accordance with Code, c. 632, § 10, cuts timber thereon, the severance changes the timber from real to personal property.—Schmidt v. Vogt, 8 Or. 344.

[l] (Pa. 1865) Trees severed from the land by a tort-feasor become personalty, but the owner of the land does not lose his title thereto.—Brewer v. Fleming, 51 Pa. (1 P. F. Smith) 102.

[m] (S. D. 1903) Where a license to enter on land and cut timber was exercised by the licensee, and the timber severed from the freehold, a subsequent conveyance of the fee by the licensor could not deprive the licensee of his property in the cut timber.—Price & Baker Co. v. Madison, 17 S. D. 247, 95 N. W. 933.

[n] (Wis. 1883) Stave bolts, manufactured from timber cut on land within the time prescribed by deed of sale of the timber thereon, become personal property.—Golden v. Glock, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32.

Digitized by Google

(153 Fed. 879.)

CHOY CHONG WOH & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 225 (4,165).

CUSTOMS DUTIES—CLASSIFICATION—DRIED MUSHROOMS—MUSHROOMS PRESERVED IN TINS.

Mushrooms dried in order to preserve them and placed in hermetically sealed tins holding from 30 to 45 pounds, are within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649], relating to "mushrooms prepared or preserved, in tins, jars, bottles or similar packages," rather than paragraph 257, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], relating to "vegetables in their natural state."

Appeal from the Circuit Court of the United States for the Southern District of New York.

The decision below reads as follows:

WHEELER, District Judge. These are mushrooms dried wholly by evaporation, without other treatment, and imported in large zinc-lined boxes for protection and convenience in transportation. They appear to be "vegetables in their natural state," as classified (Kraut v. U. S. [C. C.] 139 Fed. 94), and do not appear to be in any sense preserved in tins, jars, bottles, or similar packages as claimed.

Decision affirmed.

Everit Brown, for importers.

D. Frank Lloyd, Asst. U. S. Atty.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The articles in question are mushrooms inclosed in tin boxes holding from 30 to 45 pounds. They were assessed for duty under paragraph 257, Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. [U. S. Comp. St. 1901, p. 1650], at 25 per cent. ad valorem as "vegetables in their natural state, not specially provided for." The importers, appealing from this classification and assessment, claim that the mushrooms in this condition are dutiable at 2½ cents per pound, under the provision of paragraph 241 of said act for "beans, peas, and mushrooms prepared or preserved, in tins, jars, bottles or similar packages." The uncontradicted testimony is to the effect that these mushrooms have been sun dried or kiln dried, or both, in order to preserve them, and have then been placed in hermetically sealed tins, inclosed in outside wooden boxes to protect the tin. There can be no question, therefore, that these mushrooms are "prepared or preserved in tins," and, being thus specially provided for by paragraph 241, are excluded from the provisions of paragraph 257.

The judgment is reversed.

Digitized by Google

(153 Fed. 723.)

OXFORD & COAST LINE R. CO. v. UNION BANK OF RICHMOND, VA.

(Circuit Court of Appeals, Fourth Circuit. April 10, 1907.)

No. 698.

1. EXCEPTIONS, BILL OF—TIME FOR PRESENTATION AND ALLOWANCE.

A bill of exceptions cannot be considered by an appellate court unless it was duly presented to and allowed by the trial judge during the term at which the trial was had or within the time as extended by an order made during such term, or where there is a rule of court on the subject during the time so fixed, or an extension granted before its expiration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 72½.]

2. WRIT OF ERROR—RECORD—BILL OF EXCEPTIONS—NECESSITY.

The record of a former trial of a case made a part of an agreed statement of facts on a second trial cannot be considered by an appellate court unless incorporated in a bill of exceptions or otherwise brought into the record sent to such court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2433.]

3. EXCEPTIONS, BILL OF — AUTHENTICATION — NECESSITY OF SIGNATURE OF JUDGE.

Under Rev. St. § 953 [U. S. Comp. St. 1901, p. 696], which provides that a bill of exceptions shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto, no bill of exceptions is sufficiently authenticated unless signed by a judge who sat at the trial within the time required by law, and the omission or failure to sign the same cannot be cured by a certificate of the judge that it was allowed, settled, and signed within such time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 95.]

McDowell, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of North Carolina, at Raleigh.

Thomas B. Womack and A. W. Graham, for plaintiff in error.

William L. Royall (A. S. Lanier, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

PRITCHARD, Circuit Judge. This case was before this court at November term, 1905, reported under the same title as above. 143 Fed. 193. It is again here on a writ of error based on what purports to be a bill of exceptions. Counsel for plaintiff in error moves the court to dismiss the writ of error upon the ground that the judge below who tried the case failed to sign the bill of exceptions, and also upon the further ground that there is "nothing in the record to show that any exceptions were taken or any time given in which to present a bill of exceptions except the statement of the alleged bill of exceptions." In the absence of a rule to the contrary, a party against whom there is a judgment in an action at law is entitled to

Digitized by Google

prepare and file a bill of exceptions during the term at which the case was tried relating to questions reserved at the trial. However, in the district in which this case was tried there is a rule of court which only allows 20 days in which to prepare and file a bill of exceptions. Notwithstanding this rule, the court had the power to extend the time in which to prepare and file a bill of exceptions, provided it did so within the 20 days, but, once the court permitted the 20 days to expire, then it no longer had the power to extend the time, and the case would stand just as though the term had expired.

This court in the case of Yellow Poplar Lumber Co. v. Chapman, 74 Fed. 448, 20 C. C. A. 507, in commenting on the practice as to bills of exceptions, among other things, said:

"It is now a rule of practice universally followed in the courts of the United States that an exception to the ruling of a trial judge cannot be considered in the appellate court, unless it was duly noted during the trial, and preserved in a bill of exceptions, which was presented to and allowed by the court at the term during which the trial was had, or within a time provided for by an order entered during such term, or where it has been allowed under the standing rules of the court, or with the consent of the parties, or under such circumstances as clearly show that it was the intention of the court to, and that it did, retain by special order the control of the matter, for the purpose of examining, allowing, and signing the bill of exceptions."

The court further states on page 450 of 74 Fed., 20 C. C. A. 509, as follows:

"It does not appear from this record that the court below ever lost control of the matter of the preparation and signing of the bills of exceptions. There was no standing rule of the court applicable to the same, so a special order was resorted to every time that a postponement was granted. If the court could properly postpone until the succeeding regular term the consideration of the bills of exceptions by its standing rule or by its order of record—and this seems to be conceded, the authorities showing that the practice is not unusual—then surely, as long as it keeps control of the matter so postponed by due and orderly procedure, it may adjourn the hearing of the same until the matter is properly and fairly disposed of."

Had the trial judge kept control of the case by extending the time in which to file a bill of exceptions before the twenty days under the rule had expired, he could have retained control of the same a sufficient length of time to enable the plaintiff in error to prepare and file a proper bill of exceptions.

It appears that the judgment was entered June 9, 1906, and on July 16th, after the expiration of the time allowed by the rule, the bill of exceptions was filed with the trial judge. At the close of the eleventh exception of the purported bill of exceptions there is a statement in the record to the effect that the court allowed 60 days in which to make, serve, and file a bill of exceptions, apply for a writ of error, and serve citation. On the 23d of July counsel for defendant in error filed the following paper in the proceeding:

"I have read over the foregoing bill of exceptions and I object to it because it was not filed within the twenty days required by the rule of court, and I was not notified of any application to be made for an extension of the rule and heard no application made in court.

"July 23, 1906. Union Bank of Richmond,

"By its attorney, Wm. L. Royall."

Digitized by Google

The statement in the record that the court had allowed the plaintiff 60 days in which to make up and serve a bill of exceptions cannot avail plaintiff in error, inasmuch as nowhere in the record is there any order of the judge made within said 20 days, nor afterward, allowing such extension of time.

We have carefully examined the record and are unable to find anything which shows that such order was made. The court undoubtedly had the right during the 20 days to enlarge the time prescribed in the rule, and the fact that counsel for the defendant in error was not present, or notified of such action on the part of the court, would not in the slightest degree affect the right of the court to take such action.

However, assuming that the order giving 60 days in which to file the exceptions was made, nevertheless the bill was not filed within that time. The judgment was entered on the 9th day of June, 1906, and the order directing that the bill of exceptions be filed was not made until the 24th of August, 1906. Thus the record shows that more than 60 days had elapsed after the rendition of the judgment before the exceptions were filed. Therefore, in no event, can it be said that the bill of exceptions was filed within the time allowed by law.

It is insisted by the plaintiff in error that, inasmuch as there is an agreed statement of facts certified to this court by the clerk of the Circuit Court, even if there is no bill of exceptions, still the question relating to the statute of limitations is before this court, and therefore we should consider the same independently of the bill of exceptions. While it is true that the record of the trial had in 1906 was made a part of the agreement of facts, it is equally true that the same was not incorporated in any bill of exceptions, and certainly it is not to be expected that the court will cause search to be instituted for such record, nor does it follow, if it did so, it would succeed in finding the proper record. It is to obviate such difficulties that a bill of exceptions is required. It is also equally true that said record is not even incorporated into and made a part of the present record, and therefore, if we deemed it proper to notice an error not assigned, we would have no record from which we could ascertain the facts.

We now come to consider the most important question involved in this controversy. It is contended by counsel for defendant in error that what purports to be the bill of exceptions was not signed by the trial judge. Section 953 of the Revised Statutes [U. S. Comp. St. 1901, p. 696] is as follows:

"A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto."

This provision of the statute is plain and explicit, and there can be no doubt as to its meaning. It evidently means that no bill of exceptions can be sufficiently authenticated unless signed by a judge who sat at the trial. The petition for writ of error does not show the date on which it was filed with the lower court. The assignments of error are marked filed with the judge July 16th and filed in the office July 18th, and the order of court directing that the bill of ex-

Digitized by Google

ceptions be filed was made August 24th, and the writ of error bears the same date. The record shows that the trial judge did not sign the bill of exceptions. The only reference to the bill of exceptions by the trial judge is contained in the following order which appears in the record:

"In this case at the request of the Oxford & Coast Line Railroad Company Hon. Thos. R. Purnell, U. S. District Judge for the Eastern District of North Carolina, has allowed, settled and signed within the time allowed by law, and the orders of the said judge the attached bill of exceptions and hereby orders the same to be filed. Thos. R. Purnell, U. S. Judge.
"Aug. 24, 1906."

This order of the learned judge who tried the case states that he had allowed, settled, and signed within the time allowed by law the "attached bill of exceptions"; but, when we come to examine the "attached bill of exceptions," there is nothing to show that the judge ever signed the same. Notwithstanding the fact that the judge certifies that he signed a bill of exceptions, plaintiff in error insists that an unsigned bill of exceptions should be treated as the bill of exceptions which the judge certifies to having signed and allowed within the time required by law. There is nothing in the record to account for the failure to produce the bill of exceptions to which the judge below refers; but, on the other hand, the plaintiff in error contents itself by producing what appears to be a copy of the bill of exceptions which it attempted to file with the court below.

The signing of a bill of exceptions is a judicial act which must be performed by the judge who tried the case, and the performance of this duty cannot be delegated to another, nor can the judge after the time within which the bill of exceptions is required to be signed cure an omission or failure to sign the same by certifying that it was allowed, settled, and signed within the time allowed by law.

In the case of Origet v. United States, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743, the record contained a paper headed "Bill of Exceptions," at the foot of which appeared the following:

"Allowed and ordered on file Nov. 22, '83, A. B."

It was held that:

"This cannot be regarded as a proper signature by the judge to a bill of exceptions, nor can the paper be regarded for the purposes of review as a bill of exceptions. To make it clear that a seal to a bill of exceptions was not necessary to its validity, Congress, by section 4, of the act of June 1, 1872 (17 Stat. 197, c. 255), now section 953 of the Revised Statutes, [U. S. Comp. St. 1901, p. 696], enacted as follows: 'A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto.' This provision merely dispensed with the seal. The necessity for the signature still remains. We cannot regard the initials 'A. B.' as the signature of the judge, or as a sufficient authentication of the bill of exceptions, or as sufficient evidence of its allowance by the judge or the court. Therefore, the questions purporting to be raised by the paper cannot be considered."

In the case of Harvey v. State, 5 Ind. App. 422, 31 N. E. 835, the bill of exceptions was unsigned, but the judge who tried the case had written at the foot of the same the following:

Digitized by Google

"I, George W. Grubbs, judge of the Circuit Court of said county of Morgan, certify that the foregoing and within bill of exceptions in the case of the State of Indiana v. Peter C. Harvey, was tendered to me for my signature on the 20th day of November, 1891, at the court house in said county and within the time given for preparing the same, to-wit: within sixty days after judgment was rendered in said cause. Geo. W. Grubbs, Judge."

In that case it was held that the signing of the foregoing certificate by the judge could not be treated as a signature to the bill for the purpose of identifying and authenticating the same as required by law. That case is almost on all fours with the case at bar; the only difference being that the judge certified that a bill of exceptions was tendered to him within the time allowed by law, while in this case the trial judge certifies that the bill was tendered, allowed, and signed by him.

Although it was shown by the judge's certificate that the bill of exceptions was prepared and presented to him within the time allowed by law, nevertheless the court held that, inasmuch as he failed to comply with the statute which required his signature to the bill of exceptions at the time it was presented to him, such failure on his part could not be remedied by subsequently signing a certificate to the effect that the same had been presented in due time.

Also in the case of Shilitto v. Thacker, 43 Ohio St. 63, 1 N. E. 438, the court said:

"A paper purporting to be a bill of exceptions, but which is not signed as required by statute, will not be considered as a part of the record, although the journal entry in the case recites that a bill of exceptions was duly signed, sealed, allowed, and ordered to be made part of the record, and no other paper purporting to be a bill of exceptions appears in the files of the case."

The mere recitals in a record to the effect that a judge has signed a bill of exceptions are not sufficient. Congress has wisely provided that bills of exceptions shall be authenticated by the signature of the trial judge in order that appellate courts may be definitely and accurately informed as to what actually transpired in the court below. This provision is mandatory, and must be strictly adhered to in every instance wherein a review is sought by writ of error. The court below is the sole judge as to what transpired during the progress of the trial, and it must judicially determine the same when the bill of exceptions is presented and after having done so it then becomes the duty of the judge to affix his signature thereto.

In the case of Malony v. Adsit, 175 U. S. 287, 20 Sup. Ct. 117, 44 L. Ed. 163, the court, among other things, said:

"It certainly cannot be contended that, if the trial judge is able officially to sign the bill of exceptions, it would be competent for the counsel to dispense with his action, and rely upon an agreed statement of the facts and law of the case as tried. Nor can they agree that another than the trial judge may perform his functions in that regard. In Lynch v. Craney, 95 Mich. 199, 54 N. W. 879, it was said that the practice of stipulating a bill of exceptions without the sanction of the judge cannot be commended; and, if such fact be brought to the attention of the court before the argument of the case, the appeal will be dismissed. In Coburn v. Murray, 2 Me. 336, it was held that a bill unauthenticated by the trial judge cannot be given validity by consent of counsel. We are referred to no decision of this court on the precise question whether counsel can stipulate the correctness of a bill of exceptions not signed by the trial judge. But we think that on principle this cannot be done, and we

Digitized by Google

regard the cases just cited as sound statements of the law. Accordingly, our conclusion is that the errors of the trial court alleged in the bill of exceptions, unauthenticated by the signature of the judge who sat at the trial cannot be considered by us."

While it is not the policy of the court to dismiss writs of error and cases on appeal on account of slight technicalities, at the same time, the rules of this court, as well as the rules of the Circuit Court, are plain and easily understood. In this instance the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys who practice in the federal courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions.

In the case of Michigan Ins. Bank v. Eldred, 143 U. S. 298, 12 Sup. Ct. 452, 36 L. Ed. 162, the court, among other things, said:

"The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court. The trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed."

It is essential to the orderly procedure of the courts that attorneys should comply with the rules relating to the same; otherwise, it would be useless to promulgate rules for the guidance of those who may seek to review the action of the lower court.

Mr. Justice Story, in his work on Equity Pleading (section 544), in commenting upon the necessity of adhering strictly to the prescribed forms of procedure, says:

"The want of due form constitutes a just objection to the proceedings in every court of justice, for to reject all form would be destructive of the law as a science, and would introduce great uncertainty and perplexity in the administration of justice. Every irregularity of this sort is fraught with inconvenience, and generally tends to delays and doubts. And it has been well remarked that infinite mischief has been produced by the facility of courts of justice in overlooking errors of form. It encourages carelessness and places ignorance too much on a footing with knowledge amongst those who practice the drawing of pleadings."

It follows that the judgment of the court below must be affirmed. Affirmed.

McDOWELL, District Judge. I dissent.

(153 Fed. 728.)

SOUTHERN RY. CO. v. ST. LOUIS HAY & GRAIN CO.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1907.)

No. 1,329.

1. COURTS—FEDERAL COURTS—TRIAL TO COURT—PRACTICE.

On a trial of a cause in a Circuit Court without a jury, the court cannot be required to "hold" specific propositions of law presented by the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 934.]

Digitized by Google

2. SAME—FINDINGS OF FACT.

Parties to a suit at law in a federal court, tried to the court without a jury, have no right to require the court to make a special finding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 927, 934.]

3. SAME—WRIT OF ERROR—FEDERAL COURT—SCOPE OF REVIEW.

Where the finding of a federal court in a law case tried without a jury is general, a writ of error reaches only the court's ruling in the progress of the trial, and, if the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment, as provided by Rev. St. § 700 [U. S. Comp. St. 1901, p. 570].

4. COMMERCE—INTERSTATE COMMERCE—COMMISSION'S FINDINGS—EVIDENCE.

The interstate commerce act (Act Feb. 4, 1887, c. 104, § 14, 24 Stat. 384, as amended by Act March 2, 1889, c. 382, § 4, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3165]) provides that, whenever an investigation shall be made by the commission, it shall make a report in writing which shall include the findings of fact on which the commission's conclusions are based, etc., and such findings shall thereafter be deemed prima facie evidence as to each and every fact found in all judicial proceedings. *Held* that, where a proceeding to enforce the commission's findings was tried to a federal court without a jury, it was not error for the court to receive the commission's report in evidence without excluding matters of opinion stated therein, as distinguished from the commission's findings of fact.

5. WRIT OF ERROR—ADMISSION OF EVIDENCE—PREJUDICE.

Where on writ of error in a suit to enforce a finding of the Interstate Commerce Commission, the record affirmatively showed that neither the Commission nor the Circuit Court based any part of the judgment sought to be reviewed on certain evidence admitted over objection, the admission of such evidence was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153, 4185, 4186.]

6. COMMERCE—INTERSTATE COMMERCE COMMISSION—FINDINGS—EVIDENCE.

A finding by the Interstate Commerce Commission that a just and reasonable charge for the privilege of reconsigning hay at East St. Louis was one cent per hundredweight was prima facie evidence of its own truth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 145.]

7. CARRIERS—RATES—DISCRIMINATION.

A carrier's rates on through business do not prove that a local rate is unreasonable, nor can the local rate throw light on the justice or injustice of discriminations between nonlocal shipments of the same origin and destination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 84.]

8. SAME—EXCESS CHARGES—RECONSIGNMENT PRIVILEGE.

An additional charge by a carrier of two cents per hundredweight for the privilege of reconsigning hay at East St. Louis, originating in northwestern territory and shipped into southeastern territory, was excessive, within Interstate Commerce Act, § 1 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155]) prohibiting excessive rates, and thereby produced an unjust discrimination, in violation of sections 2 and 3.

In Error to the Circuit Court of the United States for the Eastern District of Illinois.

For opinion below, see 149 Fed. 609.

Defendant in error began this action at law under section 16 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 384, amended by Act March 2, 1889, c. 382, § 5, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3165]), by filing a petition to recover judgment against plaintiff in error for the amount of a reparation awarded by the Interstate Commerce Commission. A jury having been duly waived, the court heard the evidence, made a special finding of

Digitized by Google

facts, and entered judgment for the amount of the award, together with interest, attorney's fees and costs.

The reparation was awarded by the Commission on a hearing of the complaint of defendant in error against plaintiff in error and three other railroads that run to southeastern territory. That complaint, omitting the parts descriptive of the parties, was as follows:

"(3) That defendants have adopted and maintain in force upon their respective lines of railway schedules of rates and charges wherein and whereby it is provided that the charges exacted for transporting hay in car loads over said lines, respectively, from East St. Louis to said southeastern points, shall be 2 cents per 100 pounds in addition to the regular established rates for transporting hay in carloads from Cairo, Ill., to said southeastern points, when the shipments originate at points on railroads other than those of defendants and are not reconsigned at East St. Louis; and 4 cents per 100 pounds in addition to such established rates when the shipments are reconsigned at East St. Louis. That is to say, 2 cents per 100 pounds is exacted in each instance by defendants, respectively, for the privilege of reconsignment at East St. Louis.

"(4) That complainant made shipments of hay in car loads over defendants' lines of railway, as described in Schedule A, hereto attached and made a part hereof, on or about the dates mentioned in said schedule, from East St. Louis to said southeastern points; that said shipments were reconsigned at East St. Louis; and that defendants exacted for the transportation thereof, as described in said schedule, 4 cents per 100 pounds in addition to such established rates between Cairo and said southeastern points, while they contemporaneously severally transported in car loads hay that was not reconsigned at East St. Louis, for other shippers and between exactly the same originating and destination points, for 2 cents per 100 pounds in addition to said established rates between Cairo and said southeastern points.

"(5) That the cost to defendants, respectively, in each instance, of transporting such shipments from East St. Louis to said southeastern points is the same whether the shipments are reconsigned at East St. Louis or not; that the higher transportation charge hereinbefore described is unreasonable; and that by reason of the premises each of said defendants has subjected and still is subjecting complainant and its traffic to the payment of unreasonable and unjust rates of transportation and to undue and unreasonable prejudice and disadvantage, and has given, and still is giving, to said other shippers and their traffic undue and unreasonable preferences and advantages, in violation of the provisions of the act to regulate commerce, particularly, sections 1, 2, and 3 thereof."

Plaintiff in error answered separately:

"(3) It admits the allegations contained in paragraph 3 of said complaint.

"(4) It has no information or knowledge sufficient to form a belief as to the truth of the allegations contained in the fourth paragraph of said complaint in so far as same relates to various shipments made by complainant; but in so far as said allegations refer to its tariff for reconsignment this respondent admits same.

"(5) This respondent denies the allegations contained in paragraph 5 of said complaint.

"Further answering paragraph 5 of said complaint, this respondent alleges that the reconsignment privilege allowed at St. Louis and East St. Louis involves greater cost to this respondent and other railroad companies in the handling of said traffic than is incident to through shipment of same. For with reference to traffic which is reconsigned there is additional switching, greater delay of cars, extra expense in maintenance of clerical force required by taking up the expense bills of the carrier bringing the traffic to East St. Louis, the issuance of new bills of lading, new way bills, etc. There is also extra expense involved in reloading and also the increased probability of congestion in the freight yards, etc.

"Further answering said paragraph, this respondent alleges that the charge of reconsignment is in all cases practically one cent less than the rate from East St. Louis, proper, to the territory described in the complaint as 'southeastern points' and that this privilege of reconsignment is accorded to com-

Digitized by Google

plainants and others at East St. Louis at a rate invariably less than the local shipper at East St. Louis would be called upon to pay for the transportation of hay originating at East St. Louis and destined to said 'southeastern points.'

"It is true that the reconsignment privilege at East St. Louis is granted upon the condition that a somewhat greater rate shall be charged than the through rate from the point of origin to the point of destination when reconsignment is not availed of, but the benefits to the shipper and the additional expense and trouble entailed upon the carriers fully justify the slight additional charge."

The Commission's findings on the issues thus framed are embodied in the special finding of facts and judgments as rendered by the court below:

"And now again come the parties to this suit, plaintiff and defendant, by their respective attorneys, and the court having heretofore heard the arguments of counsel for the respective parties and taken the cause under advisement, and the court now being fully advised in the premises, on consideration thereof doth find that on the hearing of this cause before and by the Interstate Commerce Commission, the said Commission found in its report and opinion in substance the following facts:

"(1) Large quantities of hay produced in territory east, north, and west of East St. Louis are consumed in southeastern territory, and much of it is carried through the East St. Louis gateway and passes over defendant's lines of railway from East St. Louis to points south of the Ohio river. With the exception of the Illinois Central, defendant's lines terminate at East St. Louis, and generally also lines of railway over which the hay is carried from said producing points to East St. Louis terminate at that point.

"(2) For the transportation from East St. Louis to said southeastern points defendant applies a proportional rate, which is 2 cents per 100 pounds greater than the rate to said southeastern points from the Ohio river, if the hay is not unloaded at a warehouse in East St. Louis, regardless of whether or not the hay is shipped locally to East St. Louis, or through billed from the point of origin to the point of final destination, and regardless of provisions in the tariffs concerning through billing; but if the hay is unloaded at a warehouse in East St. Louis defendant exacts for the transportation thereof from East St. Louis to said southeastern points a rate which is 4 cents per 100 pounds greater than the rate from the Ohio river to said southeastern points.

"(3) Complainant operates two warehouses at East St. Louis, and most of the hay it handles it purchases on the track at East St. Louis, unloads, inspects, assorts, and reloads at said warehouses, and sells at southeastern points, in competition with other hay dealers who do not unload the hay at East St. Louis. In such competition complainant is therefore prejudiced to the extent of 2 cents per 100 pounds by defendant's method of applying rates of transportation, as aforesaid. Defendant claims this 2-cent difference in rates is justified by difference in cost to it between the two kinds of transportation services it is called upon to perform.

"(4) At East St. Louis transfers of loaded cars from the northern to the southern lines and transfers of empty cars from the southern to the northern lines are generally made by a connecting railroad company, and the charge made by that company for such service is $4 per car when the hay is unloaded as aforesaid, but only $2 per car when the hay is not so unloaded, and in each instance this charge is paid by the carrier which hauls the hay south from East St. Louis.

"(5) When the hay is unloaded, as aforesaid, an empty car must be furnished for the shipment by the carrier which hauls the hay south from East St. Louis, and the service of so furnishing is fairly worth from 40 to 60 cents per car.

"(6) The car is in use from 2 to 3 days longer when the hay is unloaded, as aforesaid, than when it is not so unloaded, and a fair compensation for such use is 20 cents per day.

"(7) When hay is unloaded and reloaded at warehouses, as aforesaid, the time consumed in doing the work averages from 6 to 8 hours, but the expense of such unloading and reloading is borne entirely by the shipper.

"(8) Shipments of hay to which the rate of 2 cents per 100 pounds above the rate from the Ohio river is applied, as aforesaid, and which are not unloaded

Digitized by Google

at East St. Louis warehouses, are frequently transferred from one car to another in the railroad yards at East St. Louis, either because cars in which the hay is shipped to East St. Louis from the north are out of repair, or because the northern lines are not willing to allow cars to go south from East St. Louis. The expense of such transfer is from $1.25 to $1.50 per car, and this expense is entirely borne by the carrier which hauls the hay south from East St. Louis.

"(9) The transfer charge of $4 per car above mentioned was formerly $3 per car, and the transfer charge of $2 per car above mentioned was formerly $1.50 per car.

"(10) The weight of hay in cars shipped, as aforesaid, from East St. Louis to southeastern points is from 1,000 to 2,000 pounds greater when the hay is reloaded at East St. Louis warehouses than when it is not so reloaded. This is an advantage in favor of the reconsigned hay.

"(11) Cars from the north, after being unloaded at warehouses as aforesaid, are frequently reloaded for the south, thus avoiding expense to the southern line of placing an empty car and subtracting perhaps a day from the additional time of the car service.

"(12) That, taking everything into account, the average additional expense to southern lines in case of reconsigned hay will not exceed that of direct through shipments by more than $2 to $2.50 per car, which is equivalent on the average loading of hay to about 1 cent per 100 pounds.

"(13) Much of the hay which actually passes through East St. Louis might reach its southern destination via other gateways. Hay grown in different sections also competes via these other gateways in the south with that which does or might pass through East St. Louis. These gateways are Cincinnati, Louisville, Evansville, Cairo, Memphis, Nashville, and perhaps others. The testimony showed that at all these points hay could be stopped off, unloaded, and treated as the complainant handles its hay at East St. Louis, without the imposition of any charge in addition to the through rate. The testimony showed that these markets all competed with East St. Louis, but the force of that competition did not appear.

"(14) That complainant actually paid to the Southern Railway Company on reconsigned shipments of hay, at the rate of 2 cents per 100 pounds, the difference between the reconsigning rate and the rate on hay not reconsigned, the sum of $3,144.17.

"And from the evidence heard and adduced on the trial of this cause in this court the court finds that the said findings of fact by the said Interstate Commerce Commission are supported and justified by the said evidence, and

"It is ordered that the said findings of fact, as above recited and set out, be and the same are adopted as the special findings of fact of the court, and that the same be set out in the record of this court accordingly.

"It is therefore considered, ordered, and adjudged by the court that the plaintiff herein have and recover of the defendant herein the sum of one thousand six hundred fifty nine and $^{41}/_{100}$ ($1,659.41) the same being the amount of reparation awarded by the said Commission to the plaintiff against the defendant, with 5 per cent. interest from the date of said award; and it is further ordered and adjudged by the court that the plaintiff have and recover of the defendant its costs herein to be taxed, including a reasonable attorney's fee to be hereafter fixed, and that execution issue against the defendant for the amount of the said judgment and the said costs."

Section 1 of the act to regulate commerce, so far as it pertains to transportation charges, reads as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section 2 provides: "That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this

Digitized by Google

act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

And the first paragraph of section 3 provides: "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

C. B. Northrup and Edward C. Kramer, for plaintiff in error.

P. J. Farrell and L. O. Whitwell, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge, after stating the facts, delivered the opinion of the court.

Of the 70 assignments of error the majority present nothing for our consideration. Many of them are addressed to the refusal of the court to "hold" certain "propositions of law" which were submitted to the court in writing by plaintiff in error, as though the court as judge were required to give instructions to the court as jury. Streeter v. Sanitary District, 133 Fed. 124, 66 C. C. A. 190. Other assignments are based on the court's declining to entertain certain proposed findings of fact submitted in writing. Parties have no right to require a federal court, in hearing a law case without a jury, to make a special finding. If the finding is general, a writ of error reaches only "the rulings of the court in the progress of the trial"; "and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment." Section 700, Rev. St. U. S. [U. S. Comp. St. 1901, p. 570].

Exception was taken to receiving the Commission's report in evidence. Section 14 provides:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its representation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured, and such findings so made shall thereafter in all judicial proceedings be deemed prima facie evidence as to each and every fact found."

The findings and the conclusions of the Commission were embraced in an opinion prepared by one of the members. If this case had been tried before a jury, it might have been the court's duty to separate the findings of fact from matters of opinion and to instruct the jury to disregard the latter (Western N. Y. & P. Rld. Co. v. Penn. Refining Co., 137 Fed. 343, 70 C. C. A. 23), but such a rule is inapplicable to a trial before the court alone.

Over plaintiff in error's objection, evidence was received that at markets other than East St. Louis the "reconsigning" privilege was granted without charge. If it be conceded that this evidence was not within the issues, the ruling would not necessarily afford a ground for reversal. To constitute prejudicial error when an action at law

Digitized by Google

is tried by the court without a jury, the evidence improperly admitted must have entered into the result at which the trial court arrived. Streeter v. Sanitary District, 133 Fed. 124, 66 C. C. A. 190. Here the record affirmatively shows that neither the Commission nor the Circuit Court based any part of the judgment on the objectionable evidence.

The finding that the just and reasonable charge for the reconsigning privilege at East St. Louis was one cent a hundredweight is challenged as being unsupported by evidence on the part of defendant in error and contrary to uncontradicted evidence on the part of plaintiff in error. Plaintiff in error's evidence was not uncontradicted, for in the Circuit Court the finding of the Commission was prima facie evidence of its own truth. But, going beyond that, the shipper had evidence in the way of car rentals and switching charges made by railroads against each other at East St. Louis, which supported the finding that anything in excess of one cent a hundredweight was unjust and unreasonable. It is not our function to balance this against the carrier's method of figuring that two cents a hundredweight was a just and reasonable charge.

The remaining question presented by any proper assignment of error is whether the finding supports the judgment. Hay that comes into East St. Louis by boat or by wagon has to pay plaintiff in error, whose northwestern terminus is East St. Louis, a local rate of five cents a hundredweight to the Ohio river. Plaintiff in error is not obliged to do business beyond its own tracks; but if it does it cannot make its voluntary undertakings the ground for unreasonable rates and unjust discriminations and undue disadvantages. Shipments that originate at East St. Louis cannot avoid the southeastern railroads that begin there; but shipments that originate in northwestern territory may go by other routes. To increase its traffic plaintiff in error offers to take hay of northwestern origin from connecting roads and carry it at cheaper rates, with or without the reconsigning privilege, than it carries hay of East St. Louis origin. The rates on through business do not prove that the local rate is unreasonable; and, on the other hand, the local rate can throw no light on the justice or injustice of discriminations between shipments of northwestern hay of the same origin and destination. The local rate has nothing to do with the case as we view it. The comparison is between the through rate without the reconsigning privilege and the through rate with the reconsigning privilege. The complaint concedes, by not denying, that the through rate, aside from the reconsigning privilege, is just and reasonable. The attack is upon the charge exacted for the reconsigning privilege and upon that alone. As we have already indicated, plaintiff in error is engaging in a business which it could not have been compelled to undertake; but, undertaking it, it brings itself within the requirements of the act to regulate commerce. The finding, in our opinion, supports the conclusion that the exaction is in violation of section 1 as being excessive, and thereby produces unjust discriminations and undue disadvantages, in violation of sections 2 and 3.

The judgment is affirmed.

Digitized by Google

(153 Fed. 735.)

DR. PETER H. FAHRNEY & SONS CO. v. RUMINER et al.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1907.)

No. 1,343.

1. TRADE-NAMES—NAMES OF MEDICINES—UNLAWFUL COMPETITION.

Complainant manufactured and sold a patent medicine made from herbs, which since 1888 had been known and widely advertised as "Alpenkrauter." After its sale became successful, defendants advertised a similar remedy under the name "St. Bernard Alpen Krauter." *Held*, that defendants' use of such term constituted unfair competition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 79, 82.]

2. SAME—INJUNCTION—LACHES.

In a suit to enjoin further use of the name of defendants' patent medicine as unlawful competition, complainant's inexcusable laches was not a defense to its right to an injunction restraining defendants' future misconduct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 95.]

3. SAME—RIGHT TO RELIEF—UNCLEAN HANDS.

Complainant and its predecessors since 1888 manufactured and widely advertised and sold a patent medicine, called "Alpenkrauter," as a blood purifier, claimed to cure a great number of diseases, which in fact it did not do. The public was cautioned not to consult physicians nor druggists, because the medicine was not for sale there, and, while it claimed that the medicine was composed in part of imported herbs, complainant's witness refused before the master to disclose the ingredients of the medicine or to state from what herb houses or firms the herbs were purchased. *Held*, not to show that complainant did not come into equity with clean hands, and was therefore not entitled to relief against defendants' unfair competition by the sale of another medicine under a similar name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 94.

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

4. WITNESSES—QUESTIONS—REFUSAL TO ANSWER.

Where a witness is apprehensive that some wrong will be done to his personal or property rights, he may refuse to answer before a master any question propounded, and stand on such refusal until the question raised has been determined by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 616.]

5. EQUITY—REFERENCE TO MASTER—EVIDENCE—OBJECTIONS—WAIVER.

Where a witness refused to answer a question propounded on a hearing before a master, and the question was certified to the court, but the proponent failed to press the motion to compel the witness to answer, he waived his right to an answer.

Appeal from the Circuit Court of the United States for the District of Indiana.

The appellant (complainant in the court below) sought by its bill to restrain the appellees from using as a trade word the words St. Bernard Alpenkrauter; averring that the use of such trade words by appellees, upon appellees' bottles, and in their advertising, is in the nature of unfair competition with appellant's medicines, sold for the same ailments, and known as Dr. Forni's Alpenkrauter.

The Master found that appellant was an organization existing under the laws of the State of Illinois; that appellees were citizens and residents of the State of Indiana; that appellant manufactured and sold a blood purifier;

Digitized by Google

that in this business they succeeded their father, Peter Fahrney, who in turn had succeeded his father Jacob Fahrney, who in turn had succeeded his father Peter Fahrney—the latter of whom manufactured and sold in Maryland, Pennsylvania and Virginia, a blood remedy made from herbs; that about 1888 the term Alpenkrauter was given to this remedy; that there is spent annually, for the advertising of this remedy about eighty thousand dollars; and that appellees' use of the words St. Bernard Alpenkrauter is unfair competition.

The Master stated his conclusions of law as follows:

1. The defendants' use of the words "St. Bernard Alpen Krauter" is unfair competition.

2. The complainant is entitled to the injunctive relief prayed in the Bill of Complaint unless it should be denied such relief for either one of the following reasons: (a) the complainant has not come into Court with clean hands and (b) the complainant is not free from laches.

But each of these reasons is, in my opinion, well founded, and because of each of these reasons complainant should be denied relief in this suit. As to reason (a); complainant's representations in its advertising matter practically guarantee that its medicine, Alpen Krauter, will cure—bring about the regaining of perfect health by the person using the remedy according to the printed directions on the carton—all the diseases named on complainant's carton. Such a remedy would be a miracle worker. These representations are coupled with the cautionary advice to intending patrons which, fairly interpreted, comes to this: Do not consult a physician and do not take counsel of a druggist, avoid a medical diagnosis of your ailment, ignore the recommendation of a trained pharmacist and use a secret remedy, the ingredients of which cannot be ascertained by chemical analysis and which ingredients the proprietor declines to reveal. In view of the public policy of this State on the subject of the practice of medicine and pharmacy as expressed in legislative enactment, 3 Burns' Ann. St. 1901, §§ 7318 to 7322 and 8136a to 8136g—notwithstanding sale of proprietary medicines is permitted in these statutes—and in view of the provisions of section 1995 of Burns' Ann. St. 1901, which makes it a criminal offense for one to prescribe a secret drug or medicine, the true nature of which he, if inquired of, does not truly make known and thereby endangers life, it must be said of complainant's methods that while they gain success commercially, ethically they are reprehensible; that while they may bring relief to credulous hypochondriacs they, notwithstanding, suggest, none the less, the ways of a thaumaturgist; that while they protect a recognized property right, they do not square with the doctrine of clean hands.

As to reason (b); after complainant had received from the present defendants a flat refusal to cease to use the name St. Bernard Alpen Krauter and notwithstanding the defendants did continue in the use of such name to the damage of the complainant in the sum of several thousand dollars, the complainant waited for more than four years before bringing suit against the defendants. The facts make applicable the rule on the subject of laches stated in the case of Prince's Metallic Paint Co. v. Prince Manfg. Co., 57 Fed. 938, 6 C. C. A. 647.

And upon these findings, recommended that the bill be dismissed for want of equity, which in the Circuit Court, upon the hearing of the case, was done. Further facts are stated in the opinion.

Chester Bradford, for appellant.

John E. Iglehart, for appellee.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts, delivered the opinion:

We are of the opinion that the Master was not in error when he found that the use of the words St. Bernard's Alpenkrauter was unfair competition; and we concur with him, that unless relief on account of unclean hands or laches is denied, the injunctive relief prayed for

Digitized by Google

ought to have been granted. This reduces this case to the questions, Did appellant come into court with unclean hands? And, was he free from laches?

The second of these questions is easily disposed of. The appellee, Otto Kunath, was appointed April 3rd, 1890, one of the agents for the sale of appellant's medicines, and continued as such until 1895, whereupon, in association with the other appellees, he began the manufacture and sale of the St. Bernard Alpenkrauter; and thereupon, on the 26th of December, 1896, a letter was written to him by appellant, asking a discontinuance of the use of that name, and suggesting that court proceedings would follow unless the request was observed; to which appellees replied January 19th, 1897, that they declined to drop their present form of advertising. Thereafter nothing was done until March 7th, 1901, when the bill in this case was filed. And this is the laches complained of.

McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828, was a case to restrain the infringement of a trade-mark upon a certain medicine in which it was held that acquiescence of long standing, and inexcusable laches in seeking redress, was no defense against that part of the prayer of the bill that sought to restrain an infringement in the future. And this ruling was expressly reaffirmed in Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526. Whether the delay shown here is a defense against the recovery of any damages for the past is a question that we are not now called upon to decide; for the decree appealed from dismissed the whole bill for want of equity, including the prayer for injunctive relief.

Upon the subject of unclean hands, it is our opinion that the conclusion of the Master is not supported by his finding of facts. It is true that the remedy was advertised by appellant as a cure for more diseases, perhaps, than any remedy could possibly cure. But this, in itself, is not unclean hands. Proprietary medicines, generally, promise more than they do; and for that matter licensed physicians often do the same. And with proprietary medicines, as with physicians, the object often is to give mere temporary help, under the belief of the patient that he is obtaining a cure. But whether this be an improper use of the public's confidence, or constitutes a practice against public policy, is a question to be decided by the state, through its legislature, and not by the courts under the equitable doctrine of unclean hands; for so far as this case discloses, proprietary medicines are lawful commerce, and are to be given the freedom of mere trade boasting that ordinary commerce is allowed to enjoy.

It is also true that the name Alpenkrauter connects the herb out of which it is made, in the imagination of the purchaser, with the Swiss Alps. But this is not holding out to the public that the particular root that went into the medicine was grown on the Alps. Indeed the representation in the advertising was that only a part of the herbs were imported, and a part were grown by Quakers in this country. There is therefore, in this particular, no such deception as constitutes unclean hands.

It is true also, that when appellee on cross-examination, seeking probably to find out whether any of the herbs were imported, asked

Digitized by Google

of one of the appellants what were the ingredients of the medicine, that the witness was instructed not to answer; and that when the further questions were put of what particular herb houses or firms the herbs were purchased, the witness was again instructed not to answer; from which the Master draws the inference that the herbs were not, in fact, imported; otherwise the questions would have been answered.

But all the facts of this case borne in mind, the inference drawn by the Master is not tenable. True, the witness may have been instructed not to answer, because a truthful answer would have divulged that no part of the herbs were in fact imported, or would have given a clue to the names of witnesses from whom that testimony might have been obtained. But it is equally obvious that the motive of the refusal to answer might have been an apprehension that if the ingredients were disclosed, or there was disclosed the names of the people from whom the ingredients were purchased, the whole value of the medicine as a secret preparation would be destroyed—a danger that the appellant was not willing to incur unless ordered by the court. And though a motion to compel an answer was filed, the hearing of that motion was continued to the final hearing, at which time it was not pressed. Now it is the right of a witness, apprehensive that some wrong will be done to his personal or property rights, to refuse to answer to a Master, any question propounded, and to stand upon that refusal until the question raised has been determined by the court; and when such refusal is followed by the failure of the other party to press the question in court, the legal inference is not that the facts are as the proponent claims them, but rather, the proponent failing to press the motion, that he acquiesces in the right of the witness to refuse to answer—the record thereafter standing as if no such question had been put.

It is true, too, that in their advertising, appellant advised the public not to inquire for the Alpenkrauter at drug stores. But this does not justify, it seems to us, the inference drawn by the Master that it was meant as counsel not to consult a physician, and to ignore the recommendations of a trained pharmacist—the plain motive for the suggestion being, that the Alpenkrauter was not on sale at drug stores, and that to inquire for it would result in no purchase of appellant's medicine, but might lead to the inquirer's being induced to purchase something else. Surely, so long as proprietary medicines are lawful commerce, precautions of this kind, obviously commercial, are not within the doctrine of unclean hands.

That the whole traffic in proprietary medicines may be injurious to the public; that remedies, the ingredients and formula of which are secret, should be forbidden; that the sick and ailing should be protected against every offer of help except those coming from licensed physicians and pharmacists, are each questions that the public can take up and decide for itself, through the legislative branches of its governments; but that not having been done as yet, by the public will thus expressed, it does not seem to us that the facts in the record before us furnish a reason why the courts should formulate a public

Digitized by Google

policy, or withhold the aid of the law to protect this commerce, as yet lawful, against the unlawful piracy of another.

The decree appealed from will be reversed, with instructions to grant the injunction as prayed for in the bill.

(153 Fed. 739.)

JAYNE et al. v. LODER.

(Circuit Court of Appeals, Third Circuit. May 15, 1907.)

No. 34.

COSTS—CIRCUIT COURT OF APPEALS—PRINTING RECORD.

Under amended rule 23 (150 Fed. xxxii, 79 C. C. A. xxxii) of the rules of the Circuit Court of Appeals for the Third Circuit, which provides that. in case of reversal, affirmance, or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given, the cost of such printing is so taxable, although it was done at the instance of the plaintiff in error and not of the clerk, as contemplated by the rule, where the record as so printed was accepted by the clerk, and no timely objection was made.

On Appeal from Taxation of Costs.

For former opinion, see 149 Fed. 21, 78 C. C. A. 653, 7 L. R. A. (N. S.) 984.

Before GRAY and DALLAS, Circuit Judges, and ARCHBALD, District Judge.

DALLAS, Circuit Judge. Our decision in this case was one of reversal, with costs, and therefore, at least prima facie, the plaintiffs in error were entitled to have the amount paid for printing the record taxed against the defendant in error; for rule 23 (150 Fed. xxxii, 79 C. C. A. xxxii), since its amendment, as well as before, contains this unequivocal provision:

"In case of reversal, affirmance or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given."

That this clause would not have been retained when rule 23 was altered if it had been intended that thereafter the cost of printing the record should not be taxed against the losing party is, as an abstract proposition, unquestionable; but it is contended that the amount paid for this particular printing is not so taxable, because it was done at the instance of the plaintiffs in error, as the original rule had prescribed, instead of being "caused" by the clerk, as the amended rule directs. The order of December 7, 1893, did make the clerk responsible for the correct printing of the record, but it made no change whatever in the ultimate liability for its cost. In the present case the clerk accepted copies supplied by counsel for the plaintiffs in error; but to this no timely objection was made, and none will now be considered. We must assume that, if they had been printed under his own supervision, the expense would have been the same.

There does not appear to be any substantial controversy respecting the amount to be allowed, and upon the general question presented enough has been said to show that the taxation of costs now appealed from should be recommitted to the clerk for correction in accordance with this opinion; and it is so ordered.

Digitized by Google

(153 Fed. 880.)

A. ZANMATI & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 226 (4,176).

CUSTOMS DUTIES—CLASSIFICATION—MUSHROOMS SLICED AND DRIED—"NATURAL STATE"—"PREPARED"—"PRESERVED."

The slicing of vegetables solely to facilitate the natural drying operation is not sufficient to remove them from their natural state; and mushrooms cleaned, sliced, and dried in the sun are dutiable as "vegetables in their natural state," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 257, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], rather than as "vegetables prepared or preserved," under paragraph 241, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649].

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here on appeal from a judgment affirming the decision of the Board of General Appraisers, G. A. 6,253 (T. D. 26,-968), which affirmed the action of the collector. The decision below reads as follows:

WHEELER, District Judge. These are mushrooms cleaned, sliced, and dried on sieves in the sun. The question is whether they are "vegetables prepared or preserved," under paragraph 241, or "vegetables in their natural state," under paragraph 257, of the act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 170, 171 [U. S. Comp. St. 1901, pp. 1649, 1650]. In Petry v. U. S. (C. C.) 99 Fed. 261, beets sliced and kiln dried were held not to be in their natural state, and in Kraut v. U. S. (C. C.) 139 Fed. 94, mushrooms merely dried in the sun were held to be so. There would be apparently no difference in effect upon the vegetables between sun drying and kiln drying; but the slicing seems to take them out of their natural state.

Decision affirmed.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The merchandise involved in this appeal consists of mushrooms cleaned, sliced, dried in the sun and imported in barrels, which were assessed for duty under the provisions of paragraph 241 of the Tariff Act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649]), at 40 per cent. ad valorem, as "vegetables prepared or preserved * * * not specially provided for," and claimed by the importers as dutiable at 25 per cent. ad valorem, under the provisions of paragraph 257 of said act, as "vegetables in their natural state, not specially provided for." The Board of General Appraisers upon an examination of the samples found that the mushrooms were sliced to facilitate the drying, and the evidence showed that this slicing was done when the mushrooms were cleaned.

This importation is to be distinguished from that considered in Choy Chong Woh & Co. v. United States, 153 Fed. 879,[1] where we held, as mushrooms subjected to a drying process and preserved in tins

[1] 82 C. C. A. 608.

Digitized by Google

so sealed as to be air tight were dutiable eo nomine as mushrooms "prepared or preserved in tins," they were not dutiable as "vegetables in their natural state, not specially provided for." And this importation is not within the reasoning of this court applied in Leaycraft v. United States, 130 Fed. 106, 64 C. C. A. 440, where we held that the starch obtained from the arrowroot plant by mashing the tubers, soaking the pulp in water and thus dissolving it out, allowing it to settle, cleansing it, and finally drying it, was not free as "arrowroot in its natural state," but was dutiable as "starch" eo nomine under paragraph 285 of the tariff act of 1897. Here the mushrooms have not been subjected to any process whereby their condition is changed or advanced from a state of nature.

It has frequently been held that mere evaporation of the juice or sap in a vegetable product by the heat of the sun does not change the nature of the product or remove it from its natural state. Frazee v. Moffitt (C. C.) 18 Fed. 584; Kraut v. United States (C. C.) 139 Fed. 94; Sonn v. Magone, 159 U. S. 417, 16 Sup. Ct. 67, 40 L. Ed. 203. It would seem to follow that the slicing of the mushrooms solely in order to facilitate the natural drying operation should not take them out of the category of "vegetables in their natural state."

The judgment is reversed.

(153 Fed. 881.)

U. H. DUDLEY & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 228 (3,705).

CUSTOMS DUTIES—CLASSIFICATION—PINEAPPLES PRESERVED IN OWN JUICE-ADDED SUGAR.

The addition of from 2.28 to 8.82 per cent. of sugar to pineapples preserved in cans in their own juice does not remove the fruit from the provision for "pineapples preserved in their own juice," in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], to the provision in the same paragraph for "fruits preserved in sugar."

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 148 Fed. 333, affirming a decision of the Board of United States General Appraisers (G. A. 5,787 [T. D. 25,577]), which had affirmed the assessment of duty by the collector of customs at the port of New York.

The articles in controversy consist of Singapore pineapples in tin cans. They were classified as "fruits preserved in sugar," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], and were claimed by the importers to be dutiable under the provision in the same paragraph for "pineapples preserved in their own juice." The Board of General Appraisers found that cane sugar had been added in the preserving process in quantities varying from 2.28 to 8.82 per cent., and affirmed the assessment of duty, on the basis of the conclusions stated as follows in the Board's opinion:

"Somerville, General Appraisers. We are disposed, therefore, after due consideration, to adopt the following principles for the classification of goods

Digitized by Google

of this kind: (1) Where the chemical analysis shows not over 14 per cent. of total sugar, including both invert and cane sugar, and the chemist expresses no expert opinion on the subject, the goods are prima facie subject to classification as pineapples preserved in their own juice and not in sugar, and are therefore dutiable at 25 per cent. ad valorem, under the last clause of said paragraph 263. (2) Where the percentage of total sugars runs over 14 per cent. and there is no expert opinion expressed by the chemist as to whether or not cane sugar has been extrinsically added, the probability is nevertheless that such cane sugar has been added, and the goods are, accordingly, pineapples preserved in sugar, and are dutiable at 35 per cent. ad valorem and one cent per pound, under said paragraph 263."

Comstock & Washburn (J. Stuart Tompkins, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Since the decision of this cause at circuit, our opinion has been filed in U. S. v. Johnson (Jan. 8, 1907) 152 Fed. 164, 81 C. C. A. 416, in which we had before us pineapples similarly preserved, except that the cans contained a trifle less sugar.

We are unable to distinguish between the two causes, and therefore the decision of the Circuit Court is reversed.

(153 Fed. 882.)

AMERICAN CAN CO. v. WILLIAMS.

(Circuit Court of Appeals, Second Circuit. February 17, 1907.)

No. 176.

INJUNCTION—RECEIVER OF NATIONAL BANK—DIRECTION TO RETAIN FUND PENDING SUIT.

When a party asserts the ownership of property, or a specific lien thereon, it is within the discretion of the trial court to retain the property within its jurisdiction until the questions at issue can be determined, even though such property is a fund in the hands of the receiver of a national bank and an injunction is necessary to restrain him from transmitting it to the Comptroller of the Currency in the usual course as required by statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 86-90.]

On rehearing. For former opinion, see 149 Fed. 200, 79 C. C. A. 158.

Edward B. Whitney, for the Comptroller.

James McMitchell, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges

PER CURIAM. A rehearing was granted at the request of the Comptroller of the Currency. A majority of the court is of the opinion that the order of the Circuit Court does not interfere with the Comptroller's administration of the affairs of the insolvent bank, except so far as may be necessary to preserve the rights of complainant. Our decision was simply to the effect that, when a party asserts the ownership of property or a specific lien thereon, it is within the discretion of the trial court to retain the property within its juris-

Digitized by Google

diction until the questions at issue can be determined. To permit the property to be removed from the jurisdiction of the court is, in effect, deciding in limine that the complainant has no cause of action.

The former decision of the court is reaffirmed.

(153 Fed. 883.)

UNITED STATES v. COLBY & CO.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 233 (3,967).

CUSTOMS DUTIES—CLASSIFICATION—NIGER OIL—SOAP STOCK.

Niger-seed oil, which, while used in soap making, can be used for other purposes, though without the proper qualities for such purposes, is within the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 568, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1684], for oils "commonly used in soap making, * * * fit only for such use."

Appeal from the Circuit Court of the United States for the Southern District of New York.

In the decision below the Circuit Court reversed a decision of the Board of United States General Appraisers (G. A. 5,954; T. D. 26,109), which had affirmed the assessment of duty by the collector of customs at the port of New York.

The opinion of Wheeler, District Judge, in the Circuit Court reads as follows:

This is an oil expressed from niger seed, and comes under paragraph 3 of the act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627]), where it was assessed, unless it is "commonly used in soap making" and is "fit only for such use," under paragraph 568, § 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684]. The Board found that it was scarcely known in this country, and failed to find that it was commonly used in soap making, and found that it is fit for other uses, apparently as a lubricant, an illuminant, and an adulterant of other oils, and affirmed the assessment. The evidence taken in this court shows that it is commonly used in soap making in this country, and that it can be used for these other purposes. But that is not the true test. The question is whether it is fit for other uses, and it does not appear to be. It would have to be refined for an adulterant, is too sticky for a lubricant, and too gummy for an illuminant. Decision reversed.

D. Frank Lloyd, Asst. U. S. Atty.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decision affirmed, upon opinion of the Circuit Court.

(153 Fed. 883.)

THOMSON-HOUSTON ELECTRIC CO. v. McLEAN.

(Circuit Court of Appeals, First Circuit. April 11, 1907.)

No. 668.

1. PATENTS—TERM—EXPIRATION OF FOREIGN PATENT.

The rule applied that a patent is not exempted from the operation of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], making it expire with a prior foreign patent for the same invention, because there may be differ-

Digitized by Google

ences in detail between the devices of the two patents, unless such differences affect the essence of the invention in a patentable sense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 188½. See Westinghouse Co. v. Stanley Instrument Co., 138 Fed. 823, 71 C. C. A. 189.]

2. SAME—ELECTRIC METER.

The Thomson patent, No. 448,894, for an electric meter, expired on July 8, 1904, with the British patent for the same invention.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Drury W. Cooper (Thomas B. Kerr, on the brief), for appellant.

Robert H. Parkinson (Henry C. Stetson, on the brief), for the appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and HALE, District Judges.

PUTNAM, Circuit Judge. This is a bill in equity alleging infringement of letters patent No. 448,894, issued on March 24, 1891, to Elihu Thomson on an application filed on September 26, 1890. The patent contains 18 claims, but the bill alleges specifically infringements of only claims 12, 13, 14, and 17. Claims 15 and 16 have relation to the interpretation and effect to be given to those on which the bill is specifically rested, and therefore we will recite herein claims 12 to 17, each inclusive. The only issue before us arises on a plea alleging that the invention sued on had been previously patented in Great Britain by letters issued on December 23, 1890, as of July 8, 1890, so that, under the laws of Great Britain, the patent expired on July 8, 1904, and so that, consequently, the patent in suit, by force of section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382], expired also on the day last named, and thus before the bill was filed. The plea was joined by a replication, thus bringing before the court issues of both fact and law. The Circuit Court rendered a judgment for the respondent, and the complainant appealed to us.

The introduction to the patent in suit describes it as consisting "in certain details of construction and combinations" concerning electric meters for use on either continuous or alternating current circuits, "more particularly applicable to meters wherein an electric motor is employed, and the consumption is indicated or registered by the speed of such motor." The specification also states that the meter as to which the patentee has shown the improvements covered by the patent in suit is like that described in an application filed on August 26, 1889, which resulted, as we understand, in the patent for the well-known Thomson meter of the motor type. Having especial reference to this, the counsel for the complainant says:

"The issues, then, have to do with meters that record electrical energy; that is, they take account of the amount of current (the unit being called an ampere), and the pressure at which it is flowing (the unit of this being a volt). And the electrical circuits are so arranged that the rotating part, which is termed the 'armature,' revolves at a rate proportional to the product of the amount of current by the pressure. This product is electrical energy, whose unit is called the watt. As either the amount of the pressure or the current varies, the speed of rotation varies; and, as the counting train which actuates the dials is driven by the armature shaft or spindle, the dials record and

Digitized by Google

add or sum up, or integrate, the energy, or watts, flowing through the circuit, taking account of all variations. Such a device is called an 'integrating,' or 'recording,' watt meter.

"It will be made to appear that Prof. Thomson devised two general types of meter of this sort; one having a rotating, and the other an oscillating armature. The patent in suit contemplates certain improvements upon the rotating form."

The complainant, also, explains that the patent in suit covers other improvements in the construction of meters, with which the claims involved here have nothing to do. These are quite fully explained in the specification, in part as follows:

"W is an artificial resistance in the circuit of the armature, but external thereto, and made high in amount, so as to limit the current and avoid the necessity for winding the armature of extremely fine wire to stand considerable potential. By making this resistance very high in proportion to the armature-resistance, a practically-constant current in such armature under conditions of change of speed is attained, owing to the fact that the variations of resistance and counter electro-motive force in the armature itself will be so small in proportion to the total resistance as to be practically negligible. The high resistance, W, will therefore also have an important function practically abolishing any variations in the action of the motor arising from any change of resistance at the commutator-contacts, and will for this and the reason above noted add greatly to the regularity of action of the motor."

The important claims are as follows:

"(12) In an electric meter, the combination, with an electric motor and a register for counting the movements thereof, of an artificial resistance external to the motor and placed in the circuit of such motor wherein a constant current is to be maintained; such resistance being the larger part of the total resistance of such motor-circuit.

"(13) The combination, with an electric meter operated by alternating currents, of a noninductive artificial resistance placed in that portion of the meter-circuits wherein a constant current is maintained and made to form the larger part of the resistance of said circuit.

"(14) The combination, with an electric motor operated by alternating currents, of a register for counting the movements of said motor, and a noninductive artificial resistance external to the motor and placed in the meter-circuit including the armature and commutator; such artificial resistance being made large in proportion to the resistance of the normal resistance of the armature and commutator.

"(15) The combination, in an electric meter, of an electric motor having its field traversed by current varying with the consumption and an armature for such motor placed in a constant-current circuit, in combination with an artificial resistance placed in the armature-circuit external thereto.

"(16) The combination, substantially as described, of an electric-motor field-coil, an electric-motor armature-coil provided with a commutator and placed in an alternating current circuit, including a noninductive resistance external to the armature and commutator, as and for the purpose described.

"(17) In an electric meter for measuring alternating electric currents, the combination, with that part of the motor which is included in a constant alternating-current circuit, of a noninductive resistance external to such part of the motor and made large in amount in proportion thereto."

As the complainant makes much of the fact that the external resistance covered by the claims on which the bill is rested is, as said in claim 12, "the larger part of the total resistance of such motor-circuit," we deem it important to call attention to the fact that claims 15 and 16 demand only an external resistance, without any condition as to its proportionate relation to the total resistance of the circuit to which the external resistance is incident. The complainant explains

Digitized by Google

this on the ground that they were evidently drawn "to anticipate an attempted evasion of the patent by making the external resistance somewhat less than that of the armature."

The complainant urges on us that whether the patent in suit expired as an entirety with the British patent cannot be determined, except by making a comparison claim by claim; so that, as it maintains, the mere fact that only one or more of the claims in the British patent were coequal with only one or more of the claims in the domestic patent would not affect the claims in the domestic patent not thus coequal, but would leave them still to run out the expressed term of the patent as granted. The complainant does not bring to our attention any controlling authority on this proposition. The nearest approximate is Siemens v. Sellers, 123 U. S. 276, 283, 8 Sup. Ct. 117, 31 L. Ed. 153, which is not favorable to the complainant. However, we are not called on to pass on this issue. It is sufficient for our purpose, as said by Mr. Walker, at page 151 of Walker on Patents (4th Ed.) that section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382] applied, so far as the issue here is concerned, to such claims in suit as correspond with any invention covered by some prior foreign patent, even though others of the claims of the domestic patent do not thus correspond.

The British patent was amended several years after it issued. It is so correctly and clearly shown by the opinion of the learned judge of the Circuit Court that this fact cannot in any way avail the complainant that we leave the case, so far as this topic is concerned, to rest on that opinion, without any additional comments in regard thereto.

The claim in the British patent on which the respondent relies is claim 2. The better way to exhibit this claim is in the form of the parallel columns which are given by the complainant in its brief, and which disintegrate, analyze, and compare its various elements in connection with those of claim 17 of a prior patent issued to the complainant, as follows:

Claim 17 of Patent 432,654.	Claim 2 of British Patent.
The combination, in an electric meter,	An electric meter having
of coils or sets of coils in moving relation one to the other, and	stationary coils in a main circuit, and
placed, respectively,	movable coils forming an
in the main and	armature in a shunt circuit around the work, and a
in a branch circuit	supplemental resistance
or their equivalent, as described,	in the said armature circuit; combined with
and a copper plate and	a retarding device comprising
magnet for absorbing the	a close conductor moving
dynamic energy of the coils carried	in a permanent and constant magnetic field, which
upon the structure whose	is independent of and
movements are registered to	uninfluenced by the currents
form a record of the current	flowing in the aforesaid
consumed.	coils, for the purposes
	above specified.

Digitized by Google

It will easily be seen from this analysis of claim 2 of the British patent that, except as we will hereinafter state, it contains all the elements of, for example, claim 12 of the patent in suit; that is, (1) electric meter, (2) of the motor type, (3) with artificial external resistance, (4) with the retarding device which is implied in the meter of the motor type. It does not specify a register, nor that the meter is of the motor type; but, for plain reasons, no question is made in this case on account of the omission to name in the claims the motor or the register, and no assertion is made of any differences, except as we will hereinafter state. The history of the art makes it plain that, so far as the comparison is concerned, the only true novelty in either is what is described in one as an artificial external resistance, and in the other as a supplemental resistance. The learned judge of the Circuit Court held that there were no differences of a patentable character, that is, involving invention, and that therefore the statute pleaded by the respondent controls the case.

The complainant shows that the improvements in the claims in suit are said to relate specifically to meters with motors of the rotary type, while the British patent covers also the oscillating type. So far as we are able to perceive, the fact that the British patent groups two kinds of meters, even if the domestic patent was occupied with only one, could avail nothing, unless in connection therewith there was some patentable difference in the function or mode of operation, or in some other particular. Otherwise, the statute could easily be evaded by running into one claim of the domestic patent meters of the rotary type, and into another claim meters of the oscillatory type, thus apparently dividing the grouping in the British patent, but ultimately getting back to cover its entire field. The result of mere division into moieties leaves nothing in the later domestic patent which was not in the earlier foreign one.

In regard to the differences between the claims under consideration in the domestic and British patents, we are referred by the complainant in lump to eight printed pages of the testimony of its expert witness Bentley, without any attempt on its part to analyze that evidence. We, of course, decline to analyze it ourselves, pointing to our rules which require this to be done by the complainant itself, with proper specific references as therein stated. We presume, however, that the particular propositions on this topic to which we will refer, and which have been called to our attention by the complainant at bar, will cover everything it maintains in this direction.

We gather that the Circuit Court understood that the complainant maintained that the retarding device which appears in the British claim is not included in the elements shown by the claims of the domestic patent. This did not mean that a retarding device is not implied in the claims of the domestic patent, but, as stated by the complainant, that the reference to a retarding device which appears in the specification is only incidental. This might well be, because its presence is necessarily implied. The propositions of the complainant with regard to the specific form of the retarding device shown in claim 2 of the British patent are not easy to understand. Its expert says that that device is a good thing, "probably the best form now

Digitized by Google

known, yet it is not the only retarding device"; and, what is the fact, that the claims on which this suit rests are not limited to any specific form thereof. But nothing brought to our attention shows that there is any patentable difference in favor of either patent on account of the retarding device, or that the force of the second claim of the British patent was affected by reading into it the retarding device there described, any more than it would be by reading in or reading out stationary coils in the main circuit, or by reading in or reading out of the claims in the patent in suit the register, or by reading in or reading out of the claims in either patent any well-known, implied element necessary to a practical machine.

In fact, we cannot clearly discover that the complainant places any real reliance on any alleged differences, except what it maintains is indicated by the words in claim 12 of the patent in suit, "being the larger part of the total resistance," and by analogous expressions in the other claims in suit, the phraseology of each of which is only slightly changed, and the legal effect of all of which is the same. It insists that these words do not appear in claim 2 of the British patent, and such is the fact. The observations we have already made in this connection with reference to claims 15 and 16 support the proposition that there exists here nothing fundamental or essential, so that these expressions do not in any way represent invention; otherwise claims 15 and 16 would be mere rubbish.

As truly said by the learned judge of the Circuit Court, the mere matter of difference in degree does not ordinarily suggest invention. The learned author of Walker on Patents (4th Ed.) 27, observes: "It is not invention to change the size or degree of a thing, or of any feature or function of a machine or manufacture." Mr. Renwick's practical work, entitled "Patentable Invention," observes very sensibly in regard to this, with reference both to size and proportion, that a mere change does not amount to invention; and it illustrates some exceptions to this by references to Sir Humphrey Davy's safety lamp, and to changes of proportions in chemical combinations which produce essentially new products. This fact is peculiarly illustrated in the present case. Turn again to the words "the larger part," in claim 12. Out of 100 this may be 50 plus, while anything less than "the larger part" would be 50 or 50 minus; in either case the plus or the minus being perhaps quite negligible quantities. It is impossible to say that, under such circumstances, there is any patentable difference between 50 plus, on the one hand, and 50 or 50 minus on the other. In connection with the fact that the specification of neither patent undertakes to give any rule for determining any fixed proportions of the external resistances, it is plain that the ratios are of a character to be determined by the skilled mechanic according to the changes in exigencies, and as to all this the views of the learned judge of the Circuit Court are correct.

Indeed, we may say that, as to all the alleged differences between claim 2 of the British patent and the claims in suit, our attention has not been called to anything in the record establishing invention in behalf of either patent as against the other. The complainant speaks of the differences pro and con only as improvements, without,

Digitized by Google

so far as we can discover, alleging invention at any point. Indeed, we are justified in understanding that the complainant makes no serious claim of invention in any of these differences, because it urges on us the proposition that the arguments in behalf of the respondent admit that there are differences; and thereupon it cites Thomson-Houston Co. v. Ohio Brass Co., 80 Fed. 712, 724, 26 C. C. A. 107, decided by the Circuit Court of Appeals for the Sixth Circuit, and undertakes to apply here the following words which appear in that opinion, namely: "It is not material to this discussion whether these improvements are patentable or not." It also adds that the Circuit Court fell into its error because, admitting differences to exist, its opinion proceeded to argue that the differences were unpatentable. We would have been very much surprised if so able a tribunal as the Circuit Court of Appeals for the Sixth Circuit had laid down any proposition of the kind maintained by the complainant to be applicable here. Following down the same page to which the complainant refers, the purpose of the observation cited is made clear, because the court states, almost in the same breath, the reason why the improvements were not material, even if they were in fact inventions, but, also, that, if they were not inventions, they covered nothing.

If differences could be set up to defeat the application of section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382], even when they involve no patentable invention, the statute would have been emasculated, and its application could always have been defeated by trivial and unimportant changes, so that it would be left practically worthless. In Westinghouse Co. v. Stanley Instrument Co., 138 Fed. 823, 829, 71 C. C. A. 189, so much relied on by the Circuit Court, we rested on the fact that the differences between the foreign patent and the domestic patent there in question involved "an essential, novel, and patentable improvement." We were not there required to rule directly on the question pressed on us here, although it is evident that we assumed the law to the contrary to what the complainant maintains. If it had been pressed on us, we would probably have pursued Siemens v. Sellers, 123 U. S. 276, 283, 8 Sup. Ct. 117, 31 L. Ed. 153, farther than we did. It was there said, at page 283 of 123 U. S., page 119 of 8 Sup. Ct., as follows: "A patent cannot be exempted from the operation of the law," that is, section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382], "by adding some new improvements to the invention." It was held in that case that the domestic patent contained certain improvements not exhibited in the foreign patent; but they did not help the complainant. Neither the decision of the court nor the opinion was directly on the issue before us; but each seems to bear strongly, if not conclusively, in support of the views of the learned judge of the Circuit Court, and of our opinion, that no mere changes in detail which do not affect the essence of the invention as covered by the respective patents can avail this complainant.

The decree of the Circuit Court is affirmed, and the appellee recovers his costs of appeal.

Digitized by Google

(153 Fed. 890.)

WESTINGHOUSE ELECTRIC MFG. CO. v. MONTGOMERY ELECTRIC LIGHT & POWER CO.

(Circuit Court of Appeals, Second Circuit. April 30, 1907.)

No. 268.

PATENTS—INFRINGEMENT—ELECTRICAL CONVERTERS.

The Stanley patent, No. 469,809, for a system of electrical distribution, was not anticipated, and claims 1 and 3 cover combinations including a converter in which the length of wire in the primary coil is substantially the same as would result from following the so called "Stanley rule," and are infringed by a converter having such length of wire irrespective of the rule or method by which such length was ascertained.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This cause comes here on defendant's appeal from an interlocutory decree of the United States Circuit Court for the Northern District of New York on final hearing, sustaining the validity, and finding infringement by defendant, of the first and third claims of complainant's patent, No. 469,809, granted to it as assignee of William Stanley, Jr., on March 1, 1892. The court below originally granted an order for a preliminary injunction (131 Fed. 86) which was reversed by this court (139 Fed. 868, 71 C. C. A. 582), and subsequently, on final hearing, the court below entered a pro forma decree for complainant, from which this appeal is taken. Prior opinions of the Circuit Court and of this court, construing and sustaining this patent, in the suit by this complainant against the Saranac Lake Electric Light Company, and known as the Saranac Case, are reported in 108 Fed. 221, and 113 Fed. 884, 51 C. C. A. 514. The opinion of Judge Colt, in the First Circuit, denying a motion for a preliminary injunction against the Stanley Electric & Manufacturing Company, is reported in 117 Fed. 309. A subsequent opinion of Judge Lacombe in the suit by this complainant against the Orange County Gas & Electric Company, known as the Orange County Case, is reported in 119 Fed. 365.

A. C. Fowler, for appellant.

J. Edgar Bull and Gifford & Bull, for appellee.

Before WALLACE and TOWNSEND, Circuit Judges, and HOLT, District Judge.

TOWNSEND, Circuit Judge. The following statement may conduce to a clearer understanding of the Stanley patent and the questions herein involved:

The invention relates to a system of electrical distribution and regulation especially adapted to incandescent light plants. The problem which confronted the inventor, Stanley, was presented by defects in existing systems which resulted in variation in the luminosity of individual lamps upon variations of pressure due to variations in the number of lights in use. Stanley discovered that the cause of this variation was a lack of harmonious action between the dynamo and the converter. He had to deal with the antagonism between leakage at the dynamo and self-regulation of secondary pressure in the transformer. Increasing the length of the primary wire decreased leakage, but diminished self-regulation. Decrease in the length of the primary wire improved regulation, but increased leakage. Stanley further discovered that these antagonistic relations could be co-ordinated to each other by the use of a certain length of wire on the primary of the con-

Digitized by Google

verter, and he told the public in his patent that the wire should be "of such length that reacting self-inductively upon its own magnetic circuit, the average counter-potential so produced approximately equals the potential applied to the primary circuit."

Of this statement, Judge Coxe says in his opinion, supra:

"In other words, if wire be wound on the primary coil until the ammeter practically shows no current when the secondary current is open, the result will be the invention of the Stanley patent."

In addition to this disclosure, Stanley further stated in the succeeding portion of the same paragraph the method employed by him in practice for accomplishing his invention, which method involves the so-called "C2R rule."

The portion of the specifications of the patent in suit containing the above statements and the statement of the C2R rule is as follows:

"In the construction of the coils P and S the following principles are to be observed: The first thing to be determined is the length of the primary wire. This should be of such length, that reacting self-inductively upon its own magnetic circuit the average counter-potential so produced approximately equals the potential applied to the primary circuit. When so constructed an ammeter will practically show no current when the secondary circuit is open. To obtain these results in practice I use the following method: I first choose the percentage of efficiency to be obtained. Then having selected a type of magnetic circuit affording as great magnetic conductivity as possible I apply such a length of primary conductor that acting self-inductively upon its core the difference of the counter-potential and applied potential multiplied by the current in the converter shall equal the predetermined loss of energy inevitable in conversion and vary the length of wire until the desired results are attained."

The claims in suit are as follows:

"1. In a system of electrical distribution, and in combination, an alternating-current dynamo and converters electrically connected with the main-line conductors in multiple arc and organized to transform the current in the main conductors into currents of less potential and greater quantity in the secondaries, each converter made with a primary coil containing such length of wire exposed to magneto-electric induction that when operated by the dynamo with which it is to be used with its secondary circuit open the electrical pressure and counter-pressure in its primary circuit shall be equal with incandescent lamps or other translating devices in the secondary circuits, substantially as and for the purposes set forth."

"3. In a system of electrical distribution and in combination, an alternating-current dynamo and converters organized to transform the current generated by the dynamo into currents of less potential and greater quantity at or near the points of consumption electrically connected with the main-line conductors in multiple arc and having their primary circuits constantly closed, each converter adapted to the dynamo operating the system by making its primary coil of such length that when supplied with its full proportionate share of the entire normal electro-motive force of the machine its secondary circuit being open the electrical pressure and counter-pressure in its primary circuit shall be approximately equal with the translating devices in the secondary circuits of the converter to be cut out of the circuit when not in use without the introduction of any resistance in the place of them substantially as and for the purposes set forth."

We are satisfied upon all the evidence that the length of wire given by the Stanley C2R rule does not substantially differ from, and is not inconsistent with, the disclosure of the discovery of the principle of co-ordination between the generator and the primary.

Digitized by Google

For reasons to be hereafter stated, it is unnecessary in the disposition of this case to discuss at length the utility or accuracy of the disclosure as to length of wire, as compared with the particular rule or method used in practice, or the alleged discrepancies between them, or to what extent the former is to be imported into the other and made a part of it. As we understand it, Stanley told the world in the earlier part of the paragraph that, in order to obtain automatic regulation, the wire must be given a length which, under certain open circuit conditions, would show practically no current or a zero current, and by this C2R rule he showed the method by which he secured the length of wire essential to the accomplishment of the desired results.

Twenty-five pages of defendant's brief are devoted to a discussion of its construction of the patent in suit. It is unnecessary to discuss all the arguments advanced in support of this construction. The fallacy of these contentions, and the fact that they proceed upon a misconception of complainant's position and our decisions, is indicated by the following quotations from defendant's brief:

"After stating in his specification that the primary circuit should be of such length that an ammeter will practically show no current when the secondary is open, the patentee says, 'To obtain these results in practice I use the following method,' and then the C2R rule is given, clearly indicating that the part of the specification which the complainant now relies upon will not give these results in practice, but that to obtain these results in practice, the C2R length of wire must be secured. The complainant, however, wishes now to reject the C2R rule and the length of wire given by it."

The first argument of defendant, whereby the rule is made a part of the claims in suit, is stated by counsel in its brief as follows:

"This court in its opinion on motion for preliminary injunction in the case at bar set at rest this question (the question whether the rule was part of the claims in suit), holding that in its decision in the Saranac Case it did not mean that the rule was to be regarded as an element of the combination, but 'that the first and third claims of the patent were for combinations which broadly included his invention.' The express finding of this court in the Saranac Case that the Stanley patent is limited to the length given by the Stanley C2R rule which this court read into the claims to save them from anticipation, and which therefore is a different length from that given by the length of the claims, stands, and has not been modified in the slightest, and not being so modified is still controlling against the complainant."

In support of this argument counsel for defendant refers to the statement in our opinion on the motion for preliminary injunction that we were not convinced that in the Wagner transformer used by defendant there was the length of primary wire required by the Stanley patent, and that infringement was not so clearly established as to justify a preliminary injunction. Counsel, therefore, claims that this statement shows that "this court did not agree with the lower court that this rule which it applied was the Stanley rule or some other method which would give the length of wire which this court sustained the patent for," etc. There is no foundation in fact or in our opinion for this assertion. Both of the judges who sat in said cause were of the opinion that the construction adopted by the court below was the correct one. But we reversed the order of the court below with great hesitation, upon the expert testimony as to the sandwiched coils in defendant's transformers and the conflicting theories upon other ab-

Digitized by Google

struse electrical problems, and gave the defendant the benefit of the doubt raised, not as to the construction of the rule or its application, but because, as stated in our opinion:

"The experts are in flat contradiction upon the question of infringement, and, in view of the large importance of the controversy, the rights of the parties should be reserved for decision until the final hearing of the cause."

Counsel for defendant quoted from our opinion on the motion for preliminary injunction as follows:

"We are not convinced that in the Wagner transformer used by defendant there is the length of the primary wire required by the Stanley patent."

Counsel then says:

"This court could not have meant 'we are not convinced that in the Wagner transformer used by defendant there is such length of primary wire that there is practically no current when the secondary circuit is open,' for it was expressly admitted, so this court could only have meant that it was not convinced that the Wagner transformer had the length of wire given by the Stanley C2R rule."

On the contrary, this is exactly what the court did mean, namely, that it was not convinced that the length of primary wire used by the defendant corresponded to the length of wire by which the co-ordination of the transformer to the generator was secured, according to Stanley's statement of his discovery, and that the co-ordination between the generator and the primary was secured by such a length of wire that under certain conditions the current would be practically zero when the secondary was open.

Counsel for defendant insists that "the part of the specification immediately preceding the Stanley C2R rule and in the same paragraph with it is imported into the C2R rule and made a part of it," while in our opinion we say: "The rule was not to be regarded as an element of the combination."

The defendant, quoting certain portions of said decision, but omitting our statement in regard to the rule, says as follows:

"The decision of this court was not to the effect that the Stanley invention is for co-ordinating the transformer to the generator with which it is to be used by any length of wire, but that it is for co-ordinating the transformer to the generator by means of 'the length of the primary wire required by the Stanley patent'; that is, 'the Stanley length.' It is evident, therefore, that this court regarded 'the length of the primary wire required by the Stanley patent,' or the 'Stanley length,' as some peculiar and definite length, and did not regard the Stanley invention as covering any length of wire by which the transformer was co-ordinated to the generator."

A reference to the claims in suit shows that the wire of suitable length was for such a length exposed to magneto-electric induction that when operated by the dynamo on open circuit the electrical pressure and counter-pressure in the primary circuit should be equal.

In the prior opinions of this court in the Saranac Case the character and scope of the discovery and invention of the patent were discussed and defined, and the validity of the claims in suit was sustained. In the opinion in this cause on appeal from the order for preliminary injunction we said as follows:

"The decision of this court in Westinghouse Co. v. Saranac Lake Co. was in effect that Stanley contributed to the prior art the discovery that the auto-

Digitized by Google

matic and constant regulation of the pressure of the alternating current at the secondary terminals depended upon the co-ordination of the transformer to the generator, and the invention that this could be effected by means of a primary wire of suitable length, that the first and third claims of the patent were for combinations which broadly included his invention, and that because, in order to instruct those skilled in the art how to ascertain the length of the primary wire he had formulated in his patent one rule for doing so, the rule was not to be regarded as an element of the combinations."

In the opinion of Judge Lacombe in the Orange County Case, he said, referring to our opinion in the Saranac Case, as follows:

"It seems to this court that the Court of Appeals found that the claims of the patent were for a combination of the elements therein set forth, of which one element was a primary coil having a length of wire equal to what would be found to produce the indicated results when applying the Stanley rule."

In this statement we concur.

It may, therefore, be considered as determined by the prior decisions in this circuit that as Stanley was the first to discover and suggest that the difficulties encountered in attempting to secure self-regulation were due to an improper length of wire in the primary coil, and to disclose a method and means for determining the proper length of wire, thereby proportioning the energy absorbed by the generator to the energy consumed, he was entitled to cover broadly any transformer having substantially such length, irrespective of the method by which such length was ascertained. It follows from this conclusion that the Stanley C2R rule, which states the method of securing the proper length is not to be regarded as an element of the combination of means of the claims in suit, which include such wire, and that the question of infringement depends on whether the primary of defendant's transformer has substantially such a length of wire as would have been obtained if its length had been determined by the Stanley C2R rule.

Upon further examination of the prior opinions bearing on the questions raised herein, and exhaustive consideration of the briefs and arguments of counsel, we remain of the opinion that the claims in suit are for combinations which include the invention of a transformer which produces the automatic regulation of the Stanley patent by the use of a length of wire substantially the same as that which would result from following the method stated by him in his general rule applicable to all conditions, and that a transformer having such a length of wire is an infringement of the claims in suit, irrespective of the process or rule or method by which the result may have been obtained.

That the defendant, in support of its argument, misstates the position of complainant, appears from the following statements in the respective briefs:

Defendant.	Complainant.
Referring to the Hopkinson equation, counsel says: "The complainant, seeing the force of the situation, now says that it is not necessary to have in a transformer the corresponding length of wire given by the C2R rule."	"I admit, as emphatically and as broadly as words can make it, that no transformer infringes which does not have on its primary a length substantially such as it would be if such length had been determined by the Stanley C2R rule."

Digitized by Google

In the disposition of the questions herein we have proceeded upon complainant's admission, quoted above, and for that reason have found it unnecessary to pass upon defendant's claim founded on its statement of complainant's contention as to the C2R rule length of wire. In view of the fact that anticipation and lack of patentable novelty are not res adjudicata as to this defendant, the further defense is here pressed that the Stanley rule, so far as defendant follows it, was anticipated by Kennedy and Hopkinson. This contention is based on the fact that the Stanley C2R rule did not appear in Stanley's original specifications of November 26, 1885. It is claimed by complainant, however, that the Stanley discovery and invention as construed by this court was disclosed in said original specifications, and was then embodied in a transformer. And the date of the Stanley invention was found to be in 1885 by Judge Coxe in the Saranac Case, and by the Commissioner of Patents in interference proceedings of Stanley against Slattery.

The Kennedy patent and articles were fully considered and disposed of by the court below and by this court in the Saranac Case, and need not be reconsidered. But, so far as concerns the Hopkinson equation, whether the Stanley invention be given the date of 1885 or 1888 is immaterial, for the following reasons: Like the other alleged anticipations relied upon in the Saranac Case, it fails to state that one "may determine the proper length of the primary coil by connecting the transformer in circuit with the dynamo with which it is to be used, and then winding on wire until the loss indicated by the formula C2R, with the secondary circuit open, equals a certain loss of energy." It appears from defendant's testimony that they did not use the Hopkinson formula until 1891 or 1892, some years after Stanley had explained why and how his rule disclosed a practicable method for securing self-regulation. The Hopkinson equation is not mentioned or discussed by complainant's expert, and we are therefore left without any means of determining the accuracy of Hopkinson's statement that "for practical purposes these equations are really sufficient." But upon the testimony of defendant's experts it is shown to have no bearing on the issues herein. Thus, defendant's expert, Nipher, says:

> "It was these equations which gave the public—those skilled in the art—the information which they needed concerning the nature of the problem, and the work of Rankin Kennedy and Zipernowski and Deri furnished the practical application of these principles, at the same time giving specific and sufficient instructions concerning the exact method of procedure, in order to realize the conditions in practice."

But this court has already considered and disposed of these alleged anticipations, and has held that they failed to disclose the invention in suit.

Again, as defendant's expert, Nipher, says:

> "The length of the wire wound on in this method of design [Hopkinson's] is entirely different from that which would be obtained by following the Stanley rule."

That is, the defendant relies on the disclosure by Hopkinson both as a defense against infringement, on the same ground on which it claims

Digitized by Google

noninfringement by its own transformer, and also as an anticipation. It claims, on the one hand, that upon its construction of the Stanley rule, which admittedly makes it indefinite and misleading and gives an impracticable length of wire, the defendant does not infringe, because its construction, in which wire of a different length is used, follows the practicable method disclosed by Hopkinson, which gives the proper length of wire. And, on the other hand, it claims that its method anticipates the Stanley rule because it follows the prior Hopkinson equation. The defendant, therefore, is in this dilemma: If the Hopkinson equation, as Nipher, defendant's expert, asserts gives a length of wire different from that specified by Stanley, then, as we are of the opinion, as hereafter shown, that the defendant uses the Stanley length, the contention that it uses the length of the earlier Hopkinson equation is not sustained. And, if the Hopkinson equation could be so construed as to give the Stanley length of wire, then the admission that it merely gave the information by means of which Rankin Kennedy, etc., furnished a later practical application of these principles, as stated above by defendant's expert, then Hopkinson is relegated one step further back than the post-art publications already disposed of in the earlier opinions of the court.

We find nothing new in this record which indicates that any of the so-called prior art adversely affects the status of the patent in suit. The single question to be disposed of on this appeal is that of infringement. Infringement is denied, on the following grounds:

> "Defendant uses a different length of wire than that prescribed by the patent. by reason of using less iron in the core."

In support of this proposition defendant states that the length of wire used in its transformer has a length in the primary coil over 50 per cent. greater than the length in the complainant's Great Barrington transformers and contends that if the Great Barrington transformers have not the C2R length then the Hopkinson length antedates the C2R length whatever the latter may be. For reasons stated above the alleged priority of the Hopkinson length equation is immaterial.

The defense that as defendant uses a core of lesser weight and therefore a length of wire different from that used by complainant, it does not use the length of wire of the Stanley rule, is immaterial because, as the Court of Appeals has held:

> "The amount of wire for a given character of current supply cannot be stated in feet and inches because it is, to some extent, dependent upon other things, such as the quality of iron employed in the core, the quality of copper used in the coils, the shape of the transformer, and the way the coils are applied."

The curve sheets illustrating tests of complainant's transformers and of defendant's transformers in the Saranac Case and in this case show that in each the currents are substantially the same, and that the current falls with an increase in the number of windings until it reaches the point where the current is practically zero, this being the point where by the application of the C2R rule the winding should cease. And, while different lengths of wire were used on certain of the com-

Digitized by Google

plainant's Westinghouse transformers, and on the infringing Saranac transformers, and on defendant's transformers, yet in each case the lengths of wire cease at the same point or just beyond the knee of the curve. Again, it appears from a comparison of such of complainant's and defendant's transformers as have substantially the same length of wire that the respective transformers are substantially alike in material, size, and shape of cores. In fact, the assertion of complainant's expert, Waterman, that the defendant's transformers are in their essential particulars like those held to infringe in the Saranac Case does not seem to be seriously disputed.

The construction of defendant's transformers in the Saranac Case is stated by Judge Coxe in his opinion therein, where, referring to defendant's plant, he says:

> "Each converter is made with a primary coil containing such length of wire exposed to magneto-electric induction that when operated by the dynamo with which it is to be used, with its secondary circuit open, the electrical pressure and counter-pressure in its primary circuit are approximately equal."

A further defense is that:

> "Defendant's transformers have their coils sandwiched, which not only gives a different length of wire from the patent, but does not require such transformers to be adapted to the dynamo, except as to pressure, and therefore they do not infringe."

Great stress is laid by counsel for defendant on this feature of sandwiching. As explained by the expert for defendant, it consists in the "subdivision of the coils into sections to avoid excessive electro-motive force between adjacent parts." By this method of construction the primary and secondary coils are brought close together and the amount of leakage is reduced. The result of sandwiching the coils is to require a greater length of wire. No reference is made in the Stanley patent to sandwiching, and its practical importance in constructing transformers was not at first appreciated by the complainant company, and it did not adopt this construction until the year 1892.

The plausible argument is made that as Stanley used a large core to prevent leakage, while the defendant produces the same result by sandwiching its coils, necessarily using in so doing different lengths of wire, that thereby the necessity of correlating the transformer to the dynamo as to "frequency and electrical pressure," as in the Stanley construction, is dispensed with, and that infringement is thus avoided.

But it appears from the testimony of defendant's experts that this sandwiching and its desirability to prevent leakage was well known long prior to the invention in suit; in fact, that it was a common expedient for that purpose. We fail to find any suggestion that this arrangement dispenses with the necessity of "the co-ordination of the transformer to the generator" by the use of a primary wire of suitable length. And we do not understand that in these circumstances a mere difference of length of wire by reason of sandwiching is any more material upon the question of infringement than differences in other parts of the apparatus. We again repeat, but with our italics, what this court said in the Saranac Case:

Digitized by Google

"The amount of wire for a given character of current-supply cannot be stated in feet and inches because it is, to some extent, dependent upon other things, such as the quality of iron employed in the core, the quality of copper used in the coils, the shape of the transformer, and *the way the coils are applied.*"

The whole argument of defendant in support of noninfringement proceeds upon the theory that the Stanley rule is misleading and impracticable.

Thus, Prof. Gray, one of defendant's experts, having testified as to his construction of the rule (a point to be hereafter discussed), says as follows:

"X-Q. 29. And, in your opinion, no transformer will have what you term the Stanley length of wire unless it has on its primary a length which will give these impossible results. Is that right?

"A. I believe the instructions in the patent lead to such an impossible conclusion.

"X-Q. 30. So that, when you say that the Wagner transformers which are involved in this controversy do not have the Stanley length of wire, you would make the same statement concerning every transformer that was ever built?

"A. When I say that the defendant's transformers do not contain the Stanley length of wire, I mean practically that the length of wire used in defendant's transformers could not have been obtained by the Stanley rule, because I consider the rule to be entirely an unworkable one.

"X-Q. 31. Being an entirely unworkable rule, in your opinion, of course, no transformer that was ever built could have what you are construing to be the Stanley length of wire?

"A. I consider that no transformer that was ever built, and successful, could have been designed by this rule."

The substantial and difficult proposition presented by the argument of defendant on the question of infringement, therefore, is that the commercial transformers do not have the Stanley C2R length of wire; or, in other words, that the patent is invalid for lack of invention. We have carefully studied the argument in defendant's appendix on this point, and we think each proposition there advanced is met by the discussion in complainant's brief, supported by the facts proved or admitted on the record. That Stanley made and disclosed an invention of a practical, working device must be assumed; that upon defendant's construction of the patent a transformer built according to its instructions would be a useless one is admitted.

The decision as to infringement depends upon the construction to be given to the phrase "loss of energy inevitable in conversion," occurring in the following passage in the specifications:

"To obtain these results in practice I use the following method: I first choose the percentage of efficiency to be obtained. Then having selected a type of magnetic circuit affording as great magnetic conductivity as possible I apply such a length of primary conductor that acting self-inductively upon its core the difference of the counter-potential and applied potential multiplied by the current in the converter shall equal the predetermined loss of energy inevitable in conversion and vary the length of primary wire until the desired results are attained."

This language is construed by the counsel and experts, respectively, as follows:

Digitized by Google

Complainant.

"I contend that this phrase means the copper loss in the primary before the secondary is applied to the core; or, as electricians say, the primary open-circuit copper loss."

Defendant.

"I understand the passage referred to to give instructions to wind on wire until the copper losses in the primary equal the total loss inevitable in conversion. I was careful to point out in my direct testimony that I considered the inventor to believe that there was no iron loss, and also that there was a probability that the energy lost in the secondary was considered to be part of the energy converted and was therefore not included in the loss appearing in the primary. * * *

"X-Q. 25. You use the term 'loss inevitable in conversion' to include what?

"A. I consider that the losses inevitable in conversion include the copper losses in both coils, and also the iron loss."

Defendant's construction is supported by expressions in Stanley's original specification and by indications that he knew very little about iron losses in the core of the transformers, and it is claimed that he thought the copper losses were the same for all loads.

Prof. Nipher, expert for defendant, says on this point as follows:

"The loss of energy inevitable in conversion he thought was a definite loss, constant for all loads, and the same as for no load, and could therefore be determined by finding the C2R loss in the primary coil with the secondary circuit open. The Stanley rule was based on this fundamental misconception of the action of the transformer."

And it is claimed that because of his ignorance in these regards he made an impracticable and misleading rule, which, if followed, upon one interpretation would give a length of wire which would be "ridiculously small," or upon another interpretation "enormously large."

The arguments in support of these assertions are elaborately discussed in the opinions of defendant's experts. It is admitted that the language used is capable of either of the constructions claimed.

The construction contended for by defendant assumes that the meaning of the term "predetermined loss of energy inevitable in conversion" means the "total losses in the transformer," including therein "the full load primary and secondary copper loss plus the iron loss, which is the same at no load as it is at full load." The result of this construction is to make the patentee say that after having selected in advance a percentage of efficiency, which, it is agreed, is the ratio between the input and output at full load, say, for example, in a 1,000 watt transformer, an efficiency of 95 per cent., which would mean a loss of 50 watts, that then the C2R rule means that the constructor is to wind on wire on the primary until the copper loss thereon shall equal the total copper and iron losses of energy inevitable in conversion.

This construction is explained by one of defendant's experts as follows:

Digitized by Google

"The patentee had a theory that there were no iron losses, that the iron core was a frictionless vehicle, and that the losses were all in the copper, and he thought that when the wire was wound on until the copper loss was equal to the predetermined loss that he would have a transformer which, when completed, would deliver the power put into it, less the copper loss on open circuit. He thought he had taken into account all the losses in the transformer."

As stated above, there is evidence outside the patent indicating that the patentee in common with the general public was ignorant in regard to iron losses in the core at this period.

One of the experts for defendant says as follows:

"If the patentee's ideas as above recited had been correct, if there had been no iron loss, and if the copper loss had been constant throughout the entire working limits of the converter, this Stanley rule would not have been absurd any more than it would have been absurd to build a buggy with the friction on one axle equal to the friction on four axles, if the other three axles had no friction. In the Pope letter of December 10, 1886, he has stated that this iron core 'should have such capacity as to act as a frictionless vehicle to transform all the lines of force from the primary to the secondary circuit, without loss in transmission.'"

The forcible arguments in support of complainant's construction, as stated above, accord with the fundamental principles of interpretation applied to this patent, and enforced by its inventive results, and with the reasoning which would naturally be attached to the language used.

These arguments may be summarized as follows:

1. It is settled by the decisions of this court that the patentee contributed the discovery of the dependence of regulation of pressure upon the co-ordination of generator and transformer, and the invention of a means by which this could be effected, namely, the primary wire of suitable length, and disclosed a method for determining that length with mathematical exactness by a rule applicable to all conditions, including the winding on of wire until the loss indicated by the C2R, with the secondary circuit open, shall equal a certain loss of energy.

2. The defendant's construction would nullify the invention by making the patentee direct either the use of a wire so short that it would burn up the transformer, or so long that it would extend for hundreds of miles. This construction, as shown above, would further make the patentee say that the copper loss on the primary with the secondary open should be equal to all loss of energy with the secondary applied, although the whole context indicates that the patentee was dealing with open circuit conditions.

3. Counsel for defendant in the Saranac Case assumed that complainant's construction was the correct one. In their brief they say:

"There can be no question that 'the predetermined loss of energy inevitable in conversion,' here referred to, is the wire or resistance loss in the primary coil at no load, and that the rule deals merely with the primary coil, and can have nothing to do with the total loss in the converter when the secondary coil had been adapted thereto. * * * It is merely the wire or copper loss in the primary coil when there is no secondary coil, or with the secondary circuit open."

4. It is the duty of the court to adopt such a construction of a meritorious patent as shall sustain rather than invalidate it.

Digitized by Google

As this court said in Dixon-Woods Co. v. Pfeifer, 55 Fed. 390, 395, 5 C. C. A. 153:

"The patentee told the trade of which he was a member by what mechanical means breakage of glass in the process of annealing could be saved; in other words, how to anneal glass better and more economically. His patent described clearly enough the ways in which bars and the operative mechanism should be constructed and operated, and the glass should be conveyed through the leer. He did not know, or he did not tell, why the new method would produce better results. He simply told how to construct a machine which carried the glass through the leer on a level, and saved much breakage; but he ought not to lose the statutory benefits which would certainly belong to him if he had seen and described the philosophy of his machine accurately."

The patentee stated a rule to be applied with reference to the only losses which at the time of the invention were capable of ascertainment by the then known devices of the art. It now appears that by the use of later appliances other losses, of which the patentee was ignorant, may be measured and ascertained. But we do not understand that this ignorance of the patentee, or the knowledge subsequently gained from the prior art, affects the status of the invention in suit. The fact that the patentee did not fully understand the principle upon which his invention operated, or that his instructions were capable of a construction which would render the patent impracticable and defeat its purposes, should not deprive him of the benefit of a meritorious invention, provided it appears, as is found in this case, that the patent sufficiently disclosed to those skilled in the art the cause of previous defects and a new and useful discovery and invention, by means of which they might be successfully overcome. He is not to be deprived of the benefit of his invention because he may have been mistaken in his statement of the reasons why the result was secured, or may have failed to correctly state the theory of their operation.

As to the use of the word "predetermined," we think that the inventor merely meant that the constructor should ascertain beforehand by experiment, as complainant's expert says and explains, certain "physical properties, with regard to which the construction is to be worked out."

5. It is admitted that at the time of the Stanley invention there was no means of measuring the loss of energy inevitable in conversion, other than the copper loss on open circuit.

Complainant quotes from defendant's brief in the court below the following statement:

"Stanley knew nothing about the loss of energy inevitable in the core. If he did, he said nothing about it in his patent, and he had no way of measuring the loss of energy inevitable in the core at the time his patent was applied for. The only way in which the loss of energy inevitable in conversion can be measured is by a watt-meter. At the time of Mr. Stanley's invention and application for patent there were no watt-meters."

Therefore, when Stanley instructed the constructor to wind on wire until the loss of energy was provided for, he must necessarily have referred to that loss which was capable of being ascertained by measurement. Neither the patentee nor the public, at the date of the invention, could have estimated losses other than the copper losses on the open primary.

Digitized by Google

6. That defendant's construction should not be adopted is further indicated by the following statements in complainant's brief, which seem to be sufficiently established by the record. Referring to defendant's construction, counsel for complainant says:

"If the phrase means this, then a transformer built according to the Stanley rule will violate every line of the specifications outside the rule. It will have an oversaturated core, whereas the specifications say that an undersaturated core is 'indispensable.' It will have a leakage current of enormous and even destructive volume, whereas the specifications say that the leakage current will be 'practically zero.' It will not have anything like the efficiency chosen, although the rule says its object is to produce a transformer having the chosen efficiency. It will not be self-regulating, although the object of the rule is to produce a self-regulating transformer. It will not be a transformer at all, because it will burn up the minute the current is turned on. It will be nothing but a piece of electrical fireworks."

It remains to consider the further argument of defendant that if the length of the primary wire on the core were such that the ammeter would show practically no current, as specified by Stanley, there is nothing in the specifications to show when to stop, because the rule fails to state definitely how much is to be wound, and that a person might wind an amount of wire which would be so short that it would burn out, or so long that it would stretch to hundreds of miles. But, upon an examination of the curves shown in complainant's exhibits, it appears that the number of turns when the working point is first reached is the time when you first get the zero result, as stated in the patent. If you continue to wind more wire on, the transformer would not be self-regulating. Therefore the patent may fairly be interpreted as directing the constructor to stop at that point.

We think the contention of complainant that the patent does, in substance, say "wind on wire until the current becomes practically zero, and then stop," is correct because it says "that the primary coil should have such length that an ammeter would practically show no current," etc., when the secondary circuit is open, and practically says, or may fairly be construed to say, that the wire should be wound on until the desired result is secured.

Counsel for defendant asserts that under the instructions of the patent the constructor may continue to wind on such a great number of turns, after reaching the zero point, that the transformer would not be a commercial one, and claims that the length is "indefinite and indeterminate" because "the number of turns may be so great, and in consequence thereof the resistance of the primary coil so high, that the transformer would not be commercial." We think it has been sufficiently shown that no such construction is justified.

In view of the importance of the interests involved, we have given exhaustive consideration to the various intricate technical questions raised, and have endeavored to dispose of them in the light of the invention derived from the expert evidence. It is, of course, possible, in view of the conflicting claims upon the electrical problems and tests involved, that we may have been mistaken in some of attempted statements of fact. But, in any event, we are satisfied that under the construction of the patent originally adopted by this court in its opinion in the Saranac Case, infringement by defendant is abundantly es-

Digitized by Google

tablished, and that the adoption of the view as to anticipation and construction now contended for by the defendant would practically result in a reversal of our former opinions.

The decree is affirmed, with costs.

(153 Fed. 903.)

WORCESTER COUNTY GAS CO. v. DRESSER.

(Circuit Court of Appeals, First Circuit. May 2, 1907.)

No. 691.

PATENTS—VALIDITY AND INFRINGEMENT—PIPE COUPLING.

The Dresser patent, No. 625,155, for pipe coupling designed to unite the ends of sections of pipe and to insulate them from each other to prevent electrolysis, was not anticipated and discloses invention. Also *held* infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

The following is the opinion of the Circuit Court, by Lowell, Circuit Judge:

This was a bill in equity for the infringement of letters patent No. 625,155, granted to Dresser, for improvements in pipe coupling. The following claims are in suit:

"1. The herein described combination of a clamping-ring provided with an aperture therethrough, a pipe-section having a uniform diameter throughout its length less than the diameter of the aperture in said ring and passing through such aperture a second pipe-section, means for insulating the pipe-sections from each other, means for insulating said first-mentioned pipe-section from the ring through which it passes, and means for compressing the insulating material by a movement of the clamping-ring longitudinally of the pipe-sections, whereby said pipe-sections are insulated from each other, said ring is insulated from the pipe-section passing therethrough, and provision is made for the movement of the said pipe-section through said ring to allow for expansion and contraction, substantially as described.

"2. The herein-described combination with two pipe-sections, of a clamping-ring for each pipe-section, provided with an aperture through the same for the passage of its pipe-section therethrough, means for insulating the adjacent ends of said sections from each other, means for insulating each of said rings from the pipe-section passing therethrough, clamping means for drawing said rings toward each other to compress the insulating material, whereby said pipe-sections are insulated from each other, each pipe-section is insulated from the ring through which it passes and provision is made for the free movement of each of said pipe-sections through their respective rings and through the insulating material to allow for longitudinal expansion and contraction, substantially as described.

"3. A pipe-coupling for uniting the adjacent ends of pipe-sections and insulating them from each other, including among its members a cylindrical portion, a clamping-plate adapted to surround one of said pipe-sections and provided with clamping-bolts, and an insulating and packing ring having a portion interposed between said cylindrical portion and said plate and an insulating sleeve portion surrounding said pipe-section between it and said plate, substantially as described.

"4. As pipe-coupling for uniting the adjacent ends of pipe-section and insulating them from each other, including among its members a cylindrical portion adapted to extend over the end of one of the pipe-sections, a clamping-plate adapted to surround said pipe-section and provided with a packing-recess on one side, and a packing and insulating ring having a portion adapted to be interposed between the said cylindrical portion and said plate and to

Digitized by Google

occupy said packing-recess and an insulating-sleeve adapted to extend between said plate and said pipe-section, substantially as described."

"7. A pipe-coupling for uniting the ends of two pipe-sections and insulating them from each other, comprising among its members two clamping-plates adapted to surround said pipe-sections, each provided with a packing-recess and apertures for clamping bolts, a coupling-sleeve adapted to extend over the adjacent end portions of the said pipe-sections, packing-rings adapted to engage said packing-recesses and to engage the ends of said sleeve, one of said rings being provided with an insulating-sleeve adapted to be interposed between one of said pipe-sections and the clamping-ring through which it passes and the clamping-bolts, substantially as described.

"8. A coupling for uniting the adjacent ends of pipe-sections and insulating them from each other, comprising among its members two clamping-plates, each provided with an aperture for the passage of the pipe therethrough and a packing-recess, a coupling-sleeve adapted to cover the adjacent portions of the pipe-sections between said plates, the packing-rings engaging said packing-recesses, and adapted to engage the ends of said sleeve, one of said rings being provided with an insulating-sleeve adapted to lie between one of said plates and the pipe passing therethrough, insulating material interposed between the ends of said pipe-sections and the clamping-bolts for uniting said clamping-plates, substantially as described.

"9. A coupling for uniting the adjacent ends of pipe-sections and insulating them from each other, comprising among its members two clamping-plates, each provided with an aperture for the passage of the pipe therethrough and a packing recess, a coupling-sleeve adapted to cover the adjacent portions of the pipe-sections, between said plates, the packing-rings engaging said packing-recesses, and adapted to engage the ends of said sleeve, one of said rings being provided with an insulating-sleeve adapted to lie between one of said plates and the pipe passing therethrough, an insulating-sleeve engaging said pipe within the coupling-sleeve, and having a flange engaging the end of the pipe, and the clamping-bolts, for uniting said clamping-plates, substantially as described."

From the specifications it appears that the object of the patent was to prevent the electrolytic action which disintegrates water and gas pipes laid underground in the neighborhood of electric wires. If the return current passing through a pipe thus laid is broken by insulating each length of pipe from its neighbor, electrolysis is so far diminished as to be negligible. The problem to be solved by the patentee, therefore, was the insulated coupling of pipes of several inches diameter laid under ground. The complainant's patent in suit has gone into considerable use. The defendant contends that the claims in suit are invalid, but otherwise does not deny infringements of claims 1, 2, 7, 8 and 9. No earlier device for accomplishing the object just described was put in evidence. The defendant relied wholly upon two classes of patents:

First. Those concerned with the coupling of pipe, without reference to insulation. Of these, 18,116, issued to Wright, is typical. Wright employed vulcanized rubber to make a tight joint, but without insulation or the thought of it. No sufficient provision was made in the Wright patent for the shrinkage and expansion of the pipes, a most important consideration in the art before the court. No. 389,797, a patent issued to the complainant before that here in suit, and even before the danger from electrolysis was recognized, also had for its object a tight joint, and it neither sought nor effected insulation.

Second. Patents intended to insulate a chandelier or a bracket from a gas pipe. This is a different art, whose appliances are useless for laying pipes underground. Corrosion of the insulating substance by water, acid, and other constituents of the soil is not to be feared in the air of a house. On the other hand, the chandelier joint must sustain a considerable weight in proportion to its size, which is not necessary in coupling gas and water pipes under ground. The patents thus urged on the court are in a different art from that of the patent in suit. In the Deavs patent, No. 299,206, for example, the two ends of the gas pipe are screwed into flanged heads, an arrangement impossible of adaptation to large pipes laid under ground. Moreover, there is uncontradicted evidence that all these gas couplings failed of their purpose. All the elements of the patent in suit were old, as the defendant points out, but

Digitized by Google

their combination was new, and it accomplished for the first time the end sought, viz., the coupling an underground joint so as to secure insulation and prevent electrolysis. The patentee thus obviated a difficulty recently discovered. The claims in suit are held valid.

Some slight question was made at the argument concerning the defendant's infringement of claims 3 and 4. No mention of the matter was made in the brief, and the suggestion came from the court. In the absence of some analysis of these claims, and of argument thereon, I do not feel myself required to make full investigation and to determine if claims 3 and 4 are limited to a specific form of the invention shown in figure 4 of the drawings, a form which the defendant does not employ. These claims, as well as the others in suit, are held to be infringed.

Decree for the complainant.

Richard J. McCarty (Arnold Scott, on the brief), for appellant.

Louis P. Whitaker (Whitaker & Prevost, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. We are entirely satisfied with the conclusion reached by the Circuit Court, and with the reasons given therefor by the learned judge of that court.

The decree of the Circuit Court is affirmed, and the appellee recovers his costs of appeal.

(153 Fed. 905.)

NATIONAL CASH REGISTER CO. v. GROBET et al.

(Circuit Court of Appeals, Second Circuit. April 30, 1907.)

No. 269.

PATENTS—INFRINGEMENT—COMBINATION OF PARTS OF DIFFERENT MACHINES.

Complainant manufactured and sold without restriction two styles of patented cash registers and indicators, numbered, respectively, 78 and 79. The two were alike, except that No. 79 contained an additional printing device, which, in combination with the other parts, was covered by a separate patent. Defendants, becoming the lawful owners of a No. 79 machine, removed the printing device therefrom and supplied and attached it to a No. 78 machine of another owner, charging and receiving payment therefor, and making, in effect, a No. 79 machine. *Held*, that such action was an infringement of the right to manufacture the patented combination, with which complainant had not parted by the sale of the No. 78 machine.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here by appeal from a decree of the United States Circuit Court for the Southern District of New York, dismissing the bill alleging infringement of complainant's patent No. 483,511, granted September 27, 1892, to Hugo Cook, for improvements in cash registers and indicators. The opinion of the court below is reported in 148 Fed. 385.

J. B. Hayward and Drury W. Cooper, for appellant.

Samuel Owen Edmonds, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

Digitized by Google

TOWNSEND, Circuit Judge. The questions at issue herein are raised by a stipulation, which, inter alia, sets forth the following facts:

"That continuously since the issuance of the patent in suit * * * complainant has manufactured and sold outright and unconditionally two styles of machines to which it has applied the trade designations 'No. 78' and 'No. 79.' No. 78 prints and ejects from the machine individual checks containing data of each registration as made. * * * No. 79 contains, in addition to what is contained in the No. 78 machine, mechanism for printing at each operation, upon a record contained permanently within the machine, the data of each registration; such permanent record being known as a 'detail strip,' and said mechanism being termed herein, for the purpose of the stipulation, the 'detail strip printing mechanism.' The No. 79 machines are those alleged in the bill to contain the invention of the patent in suit, and particularly the improvements set forth in claims 1, 3, 4, 12, and 17, upon which alone complainant relies.

"That during the year 1898 the complainant or its predecessor made and sold outright and unconditionally a cash register of the No. 78 type; * * * that said machine ultimately came lawfully into the possession of one Gustav Kessler as a vendee, direct or indirect, of the complainant, who, on or about the 1st day of May, 1906, procured the defendants in this action to add the parts to said machine (i. e., a detail strip printing mechanism) that would enable it to print also upon the permanent record or 'detail strip'; and that said defendants did, in fact, add to said No. 78 machine the said parts; * * * that said defendants charged the sum of $50 and were paid that sum by said Kessler for so doing, and the cash register made a part of this statement, and marked 'Exhibit B,' is the cash register so altered by the defendants for Kessler; that the defendants have, under like circumstances and in like manner, added detail strip printing mechanism to other No. 78 machines for their uses, and have also bought No. 78 machines, and after adding such detail strip printing mechanism have sold them as No. 79 cash registers.

"That the defendants, in doing the work hereinabove referred to, have used only parts or mechanism taken from No. 79 machines originally made and sold, outright and unconditionally, by the complainant or its predecessors, during its or their ownership of the patent in suit, which machines were put in use by the several vendees thereof and have come into defendants' hands by purchase or exchange."

The complainant herein does not claim contributory infringement, and the defendants do not claim that the acts done were in the nature of repair. Defendants claim that, as they "used only parts or mechanism taken from No. 79 machines originally made and sold, outright and unconditionally," they have merely added such portion of the complete manufacture to another machine.

Complainant's petition appears from the following statement taken from its brief:

"The complainant asks no extended monopoly by reason of any notice of license restrictions imposed upon the sale of the patented article. All that it asks is the full measure of the monopoly granted by the patent, such that in merely parting with the right to use the patented machine there shall be no encroachment upon the monopoly of manufacture, and no invasion of the complainant's exclusive right to make or unite the combinations of the patent in suit."

The forcible argument of counsel for defendants and the opinion of the court below are based upon a consideration of the rights acquired by the defendants in the No. 79 machines unconditionally purchased by them. In the disposition of the case we do not find it necessary to pass upon the questions thus presented, except in so far as

Digitized by Google

they relate to the No. 78 machine and the rights and limitations attached thereto.

It may be assumed that the unrestricted sale of a No. 78 machine "carried with it dominion over the article so sold," and conferred upon the purchaser and his vendees the right to "hold and deal with it the same as in case of any other description of property to him." Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. Ed. 1141; George Frost Co. v. Kora Co. (C. C.) 136 Fed. 467, affirmed 140 Fed. 987, 71 C. C. A. 19; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. (C. C.) 40 Fed. 577, affirmed 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500; Holiday v. Mattheson (C. C.) 24 Fed. 185. But the purchaser of the No. 78 machine acquired no right to infringe the patentee's right to manufacture said combination known as No. 79. When these defendants, therefore, supplied said attachment and added it to said No. 78 machine, and thereby converted it into a No. 79 machine by uniting to it the patented attachment which made up the complete combination of No. 79, they infringed said right of manufacture of the patented combination, with which complainant had not parted by the sale of a No. 78 machine.

It is immaterial whether this is considered as in the nature of contributory infringement, which would be made out if defendants supplied such attachments to owners of No. 78 machines with the intent that such owners should combine the attachment with the rest of the machine, or of actual infringement under the stipulated facts because the defendants have themselves added the attachments to No. 78 machines owned by them.

The well-settled rule is that the purchaser of a patented article from the patentee acquires the absolute right to the unrestricted use of said article; that by the sale it passes beyond the limit of the monopoly. But it would be perversion of this rule to say that such a purchaser may use a portion of said article for the purpose of enabling the owner of a machine sold by the patentee, without said portion to construct a patented combination which he is not licensed to manufacture or use.

The decree is reversed, with costs, and the cause is remanded to the court below, with instructions to enter a decree overruling the plea.

(153 Fed. 907.)

HALL SIGNAL CO. et al. v. GENERAL RY. SIGNAL CO. et al.

(Circuit Court of Appeals, Second Circuit. April 30, 1907.)

No. 288.

1. INJUNCTION—PRELIMINARY INJUNCTION—SUFFICIENCY OF PROOFS.

It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case, and, unless the court is convinced with reasonable certainty that the complainant must succeed at final hearing, the writ should be denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 309.]

2. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The showing on a motion for a preliminary injunction to restrain infringement of a number of unadjudicated patents, relating to electric rail-

Digitized by Google

way signals, *held* to present too many elements of doubt to warrant the granting of an injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 409.

Grounds for denial of preliminary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

Appeal from the Circuit Court of the United States for the Western District of New York.

On appeal from an order made by the Circuit Court for the Western District of New York granting a preliminary injunction restraining the infringement of five letters patent, granted to A. J. Wilson for improvements in electric railway signals. The bill alleges infringement of 53 claims of these patents, but the discussion on this appeal has been limited by stipulation of counsel to the consideration of 6 claims only. The operation of the injunction was suspended pending appeal.

Edmund Wetmore, Howard L. Osgood, J. William Ellis, and Macomber & Ellis, for appellants.

William Houston Kenyon and Henry D. Williams, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at final hearing the writ should be denied. Union Switch & Signal Co. v. Philadelphia R. R. Co. (C. C.) 75 Fed. 1004.

A record, containing 868 printed pages, composed of ex parte affidavits, patents for complicated electrical machinery and a great mass of other matter, much of it, apparently, having remote relevancy to the present issues, has been presented. To reach a clear and satisfactory conclusion upon many of the vital questions involved would, upon such a record, be difficult if not impossible.

The entire aspect of the case may be changed at final hearing and for obvious reasons the discussion of the issues involved should be restricted to the narrowest limits possible.

We have reached the conclusion that a preliminary injunction should not be issued and will briefly state the considerations which have led to this result.

First. The five patents in suit relate to a difficult, complex and abstruse subject, namely, the transmission of signals on railways by electricity. Because of its complicated character and the innumerable details involved it is peculiarly a case where the court should have the benefit of the opinions of those skilled in the art tested and clarified by cross-examination.

Second. The patents have never been adjudicated or judicially construed.

Third. The defendants assert that the patents are invalid for lack of novelty and invention and that the claims of three of the patents are not infringed.

Digitized by Google

The answer sets up 21 American and eight prior English patents and alleges four instances of prior use. It is also contended that if the patents are sustained the prior art renders a broad construction of the claims impossible.

We do not intend to pass upon these defenses further than to say that we cannot consider them as wholly devoid of merit. On the contrary we have examined the prior art sufficiently to be convinced that it is quite possible that at final hearing the court may feel constrained to limit the claims to a much narrower construction than is now asserted by the complainants. It is enough to say that the patents may emerge from the supreme test of the trial with some of the claims invalidated and others so limited as to avoid infringement.

Fourth. We think the complainants have failed to prove a case of acquiescence which may be regarded as a substitute for an adjudication. There has been no general long continued public acquiescence.

The railroads are the complainants' only customers and for many years The Hall Company's only competitor was the Union Switch & Signal Company. In a technical sense, therefore, there was no public. It is not the case of a patented device going into long continued general use in circumstances which compel the conviction that infringements would have occurred were it not for a settled conviction on the part of those who might profit by infringing that the patent is valid.

It is true that the general policy of the Union Company was not to infringe, but we are not at all convinced that this course was adopted through fear of the Wilson patents.

The Union Company and the Hall Company were active rivals in business, the former advocating and installing the so-called normal safety system and the latter the normal danger system. Every consideration, not only of honesty in competition but of self-interest also, would induce the Union Company to exploit its own system, which it thoroughly understood and in the efficiency of which it had implicit confidence. To assert that its course, which was the natural one for honorable men to adopt, was due solely to the Wilson patents, is, we think, carrying the doctrine of acquiescence beyond the limits set by former adjudications.

Fifth. We are not convinced that the complainants will suffer irreparable damage if the cause be allowed to take the usual course. That the defendants are amply responsible is conceded and if the complainants' contention is sustained and the patents construed to cover broadly the "normal danger system" there should be no difficulty in recovering the full amount of profits and damages.

Sixth. The attitude of the court may be stated in a single sentence: We think the record presents too many elements of doubt to warrant the issuing of a preliminary injunction

The order is reversed.

Digitized by Google

(151 Fed. 1022.)

SPENCER & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 11, 1907.)

No. 118 (3,953).

CUSTOMS DUTIES—MEASUREMENT—ALLOWANCE FOR IMPURITIES IN NUTS.

In ascertaining the dutiable weight of shelled nuts dutiable by the pound, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, pars. 269, 270, 30 Stat. 172 [U. S. Comp. St. 1901, pp. 1651, 1652], no allowance should be made for impurities in importations not shown to contain abnormal quantities of foreign matter, nor to vary from the ordinary wholesale condition.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The statement and opinion filed below, and here reprinted from 143 Fed. 916, were in full as follows:

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G A. 5,943 (T. D 26,090), affirming the assessment of duty by the collector of customs at the port of New York on importations under tariff act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]

PLATT, District Judge. The importers claim allowance for impurities found in certain shelled nuts. The nuts are of three varieties, walnuts, almonds, and filberts; the first in boxes, and the other two in bags. Walnuts and filberts were assessed at five cents per pound, under paragraph 270, and almonds at six cents per pound, under paragraph 269, present act (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, pp. 1651, 1652]).

They say that the proof is clear and that it is only necessary to decide whether the case falls within the principles of the Flaxseed Case (157 U. S. 183, 15 Sup. Ct. 583, 39 L. Ed. 665), or whether we shall be guided by the decision in the Currant Case (United States v. Ried, Murdoch & Co., 120 Fed. 242, 56 C. C. A. 538). Both cases make it plain that the important thing is to find out what the shelled nuts of commerce were when paragraphs 269 and 270 were enacted. These impurities are said to have appeared in the nuts since then. If this were so, and if the percentage of impurities has been clearly shown, there would be great force in the contention. Let us look for a moment and see: The collector assessed on the weigher's returns because there was nothing to show "abnormal quantities of foreign matter" in the importation, or that the merchandise varied in any respect from the "ordinary wholesale condition." The importer tries to overcome these conclusions of fact by testimony taken before the appraisers, and later in court. Over 6 per cent. of impurities were found in some of the consignments, but a claim is only made for an average reduction of 3 per cent., and for our purposes we may deem the appellants to have waived any claim for a greater

Digitized by Google

amount. The practical effect of a ruling in their favor might be to establish that percentage as the average allowance hereafter on like merchandise. The testimony before the appraisers and here, as I read it, all tends to show that the nuts of commerce did not contain as much waste and dirt prior to the present act as they do now, but the trade has at all times called them shelled nuts. The buyers may have grown more particular, but such a condition of mind on the part of the trade can hardly be said to establish a commercial usage. When the present act was passed the shelled nuts of commerce had some impurities, and it is difficult to understand the reason for asking an allowance now, when the percentage of waste has increased from perhaps 1 per cent. to perhaps 3 per cent. It is even more difficult to discover why the entire percentage of impurity should be allowed, because that would leave the nuts paid for somewhat cleaner and purer than the shelled nuts of commerce, which Congress had in mind. At what particular percentage do the impurities become appreciable? What percentage can be fairly called negligible?

The decision of the board must be affirmed.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers

J. Osgood Nichols, Asst. U. S. Atty.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decree affirmed, on opinion of Circuit Court and board of General Appraisers.

(151 Fed. 1021.)

FEDERAL INS. CO. et al. v. STARIN.

(Circuit Court of Appeals, Second Circuit. April 1, 1907.)

No. 244.

COLLISION—BARGE IN TOW AND ANCHORED YACHT—ANCHORAGE GROUNDS.

A steamer *held* in fault for a collision between her tow and an anchored yacht on the anchorage grounds in East river in the evening, and the yacht *held* not chargeable with contributory fault because she was not ringing fog signals, in the absence of clear evidence that the weather conditions were such as to require it.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Suit for collision.

Libelants obtained a decree below and from that decision this appeal is taken.

The opinion filed below, and here reprinted from 134 Fed. 1010, was in full as follows:

ADAMS, District Judge. This action was brought by the Federal Insurance Company and the Sea Insurance Company to collect

Digitized by Google

from John H. Starin the losses paid by them as insurers of the yacht Niagara, which was injured on the 6th of June, 1903, by a collision with the barge Starina, in tow of the steamer Laura M. Starin, both vessels being then owned by the respondent. The Niagara was at anchor off 28th or 29th Street, East River, on anchorage ground, on about 45 fathoms of chain, some 700 feet from shore, and the Laura M. Starin, with the Starina on her starboard side, and another barge, the Nelson, on her port side, containing an excursion party, were bound from Locust Grove, Cow Bay, for the respondent's pier No. 13 North River. The collision occurred about 10:45 o'clock P. M. The tide was ebb and carried the stern of the yacht to about abreast of 25th or 26th Street. The stern of the Starina struck the yacht's starboard quarter, doing some damage to her and to a small boat hung on davits at the side.

The yacht Rambler was also anchored in the vicinity, a little further down the river than the Niagara and about 400 feet further out in the stream.

The respondent defends on the ground that the yacht had no lights which were visible to those on the Starin or barges and was sounding no fog signals although the weather had been before and was at the time of the contact rainy, foggy and thick.

It appears that the Niagara was exhibiting the regulation riding lights. Having been run into by a moving vessel upon anchorage ground, it only remains to consider whether the Niagara was also in fault for not complying with the bell regulations, viz.:

"Art. 15. * * *

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, namely:

* * * * * * * * * * * *

(d) A vessel when at anchor shall, at intervals, of not more than one minute, ring the bell rapidly for about five seconds."

Act June 7, 1897, c. 4, 30 Stat. 99 [U. S. Comp. St. 1901, p. 2880].

It is claimed on the Niagara's behalf that the weather conditions at the time of or just before the collision, though rainy, were not such as to require the ringing of a bell; that shore lights could be distinctly seen as well as lights on the water fully a mile away; that the ferries at 34th Street and 23rd Street were not using fog bells nor other vessels in the vicinity.

The Starin claims that it got thick and misty just after she passed through the Gate and was on the west side of Blackwell's Island and continued so; that she then slowed her speed and rang the statutory bells, which she continued up to and subsequent to the time of the collision.

There is no outside testimony and it is one of those cases where the question of actual necessity for the ringing of a fog bell is dependent upon the testimony of witnesses from the colliding vessels. The Starin and her tow approached sidewise, heading towards Brooklyn, and her lookouts, such as they were, had a view forward only, they appeared to have the Rambler in view and were navigating to avoid collision with her. As has already been stated, the

Digitized by Google

Niagara and boat were struck by the stern of the starboard barge and it was not known on the Starin or tow at the time that a collision had taken place. The quartermaster on watch on the yacht shouted to the steamboat to go ahead but the hails were not heard, probably because of the noise of music on the barges. It may well be doubted if the ringing of a bell would have been any more effective than the shouting under the circumstances. Not that the shouting could be deemed a substitute for the statutory requirement of a bell but that the failure to see the lights and hear the shouts is significant of the Starin's want of attention. It seems a case in which any doubt as to the necessity of a bell should be resolved against the Starin. Her faults were sufficient to account for the collision and clear proof of a contributing fault on the part of the yacht is necessary to impose any part of the burden of the collision upon her. The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; The Minnie, 100 Fed. 128, 40 C. C. A. 312.

Decree for the libelants, with an order of reference.

James D. Dewell, Jr., and Avery F. Cushman, for appellant.
L. Kneeland, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs, on the opinion of the commissioner and of the court below.

(152 Fed. 1022.)

DILLINGHAM v. BAKLEY et ux.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1907.)

No. 701.

HABEAS CORPUS—UNLAWFUL ENLISTMENT OF MINOR—RIGHT OF PARENTS TO DISCHARGE.

The parents of a minor son under the age of 18 years, who has enlisted in the navy without their knowledge or consent, in violation of Rev. St. § 1419 [U. S. Comp. St. 1901, p. 1007], are entitled to his discharge on habeas corpus, and their right cannot be denied because of contemplated or possible court-martial proceedings against the minor for fraudulent enlistment, especially where, between the time demand for his discharge was made by the parents and the procuring of the writ, several months elapsed, during which no proceedings were taken against him.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 16.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

Habeas Corpus.

Proceedings to obtain discharge of a minor child enlisted in the United States Navy. From a decree granting the relief sought this appeal is taken.

Digitized by Google

The opinion filed below, and here reprinted from 148 Fed. 56, was in full as follows:

WADDILL, District Judge. This is a petition of Zebedee F. Bakley and Bertha Bakley, his wife, for a writ of habeas corpus, setting forth that their son, Alfred F. Bakley, a boy of the age of 17 years, enlisted in the United States navy without the consent of his parents or guardians, and is now unlawfully restrained of his liberty by Albert C. Dillingham, Commander United States Navy, on the United States receiving ship Franklin, lying in the waters of the Elizabeth river, in the Eastern district of Virginia, and praying for his discharge from such custody. The petition is duly sworn to by the petitioners, and the respondent in his return sets up the enlistment of said Alfred F. Bakley on the 14th day of March, 1906, he representing himself as of the age of 21 years; that said child is held under and by virtue of such enlistment, which was a fraudulent enlistment, assuming the facts to be true as set forth in said petition; and that he had been in the navy since the time of his enlistment and duly received compensation therefor. The return further avers that on the 24th day of July, 1906, more than a week before the suing out of the writ of habeas corpus, the said Alfred F. Bakley was "detained and recommended" for trial by general court-martial for fraudulent enlistment in the United States navy. With said return was filed a copy of the enlistment record of the said Alfred F. Bakley. Upon the hearing no evidence was offered by the government, and the evidence adduced by the petitioners, including the proper birth certificate, established that said Alfred F. Bakley was the son of the petitioners; that he was under the age of 18 years at the time he entered the navy, being at that time just 17 years of age; and that he enlisted without the knowledge or consent of his parents. Petitioners further proved that they demanded possession of the boy about the 21st of March, 1906, within one week of the enlistment, by written communication to the Navy Department, advising it of the age of the boy and that he had enlisted without their knowledge or consent. No copy of this communication was preserved by the writer, but its receipt was duly acknowledged on the 24th of the same month, as follows:

"Replying to your letter of the 21st instant, the Chief of the Bureau directs me to state that when Alfred F. Bakley enlisted he made oath that he was 21 years old. This oath must be accepted by the Bureau as correct until positive evidence is produced to the contrary. You are informed, however, that upon the presentation of such evidence the Bureau will have no alternative but to bring Bakley to trial by general court-martial for fraudulent enlistment."

Subsequently on the 17th day of July, 1906, counsel for the petitioners addressed a communication to the Navy Department, informing them of the facts and circumstances of the enlistment of the boy, and requesting his discharge from the service. To this communication no reply was made. On the 23d of July, a further communication was sent to the department by counsel, informing it of the writing of the former letter and of the parents' need of the support of the boy, and again asking for his discharge, and with this communication an

Digitized by Google

affidavit of the parents was forwarded, setting forth the correct age of the boy and the fact of their lack of knowledge or the giving of their consent to his enlistment; and on this same day a letter was written by the same counsel to the commanding officer of the United States receiving ship Franklin, upon which ship the boy was detained, informing him of the fact of the parents' desire to secure the boy's release, and inclosing a copy of the affidavit sent to the department, saying in the letter that they had been advised it was necessary that the same should be filed, and also asking to be given, as far as the officer to whom it was addressed was at liberty to state, any information as to the procedure necessary to secure the boy's release, and offering to furnish any additional affidavits needed. No reply was made by the Navy Department at Washington to either of the letters of counsel; but on the 24th of July, A. C. Dillingham, Captain U. S. Navy, commanding the Franklin, replied to the letter, saying, among other things, that the only action that the parents could take in the premises was to apply for a writ of habeas corpus, and that with the evidence contained in the affidavit sent him it was his duty to report Bakley to the Navy Department for fraudulent enlistment; this letter also advising counsel that the last Congress had passed a law requiring the recruiting officers to obtain other evidence than the recruit's statement concerning his age, etc. See Acts 59th Cong. pt. 1, p. 555; Act June 29, 1906, 34 Stat. 555, c. 3590.

These being the undisputed facts of the case, the petitioners insisted upon the discharge of the boy, and the government asked that he should not be released, but held for court-martial under the laws, rules, and regulations governing fraudulent enlistment in the navy.

The case of Ex parte Lisk (D. C.) 145 Fed. 860, recently decided by this court, would seem to be conclusive of this case, save for the fact that here the government seeks to set up the threatened court-martial proceedings as a reason for the suspension of the habeas corpus proceeding. In the Lisk Case this contention was not made; but the proposition insisted upon was that an infant could not be released, even at the instance of the parent, who had not assented to his enlistment, because court-martial proceedings might be instituted. This is the only difference between the two cases. Here, upon the fourth demand for the boy's release, and months after the first request, he was reported to the Navy Department, to the end that court-martial proceedings might be ordered against him. No such proceedings were or have ever been inaugurated, if the report was ever made at all, and within one week of the time of the notice of such threatened report this proceeding was regularly commenced by the parents of the child, in accordance with the government's suggestion as to the proper method to secure his release. This court, in the Lisk Case, supra, endeavored to make clear the fact that, so far as the parent who had not consented to his child enlisting in the navy within the prescribed age was concerned, such child could not be considered and treated, in a proceeding by the parent asking for his release, as lawfully in the navy or amenable to naval rules and discipline; and the court perceives no good reason for

Digitized by Google

departing from the decision thus reached. However much the child may personally be under naval authority and control, and a member de jure as well as de facto of the navy, still, as against his parents not consenting to his enlistment, if all the provisions of the acts of Congress, fully set forth in the Lisk Case, are to be given effect to, he cannot be considered or treated as subject to naval authority and rules and regulations in an appropriate proceeding inaugurated by his parents to secure his release. There is no substantial difference between this and the Lisk Case. The writ of habeas corpus ought not to be denied to a parent seeking the custody of his child, confessedly in the unlawful possession of another, because further proceedings looking to his detention for trial by court-martial are contemplated or may be inaugurated. In re Carver (C. C.) 103 Fed. 624, 626; In re Baker (C. C.) 23 Fed. 30. They may never be instituted at all, and it would look like trifling with justice to so treat the parent's request. This would seem to be correct in any case; but surely, where such suggestion of a court-martial was only made in answer to the repeated demands for possession of the child, the court should treat the parent's request, not as made at the time of the filing of the petition for the writ of habeas corpus. but as of the date of the first demand made for the child, and in this view in no event would the so-called court-martial proceeding avail to deny the parents' right here.

From what has been said, this case would clearly seem to be one in which the relief sought by the petitioners should be granted. It is true the decisions on the subject may be said not to be entirely harmonious; indeed, considerable contrariety exists. But it is believed that no case goes so far as to hold that the habeas corpus proceedings should be suspended because of the institution of court-martial proceedings, other than that of United States v. Reaves, 126 Fed. 127, 60 C. C. A. 675, a decision of the Circuit Court of Appeals for the Fifth Circuit. The cases to the contrary are abundant, state and federal, the state courts having formerly exercised jurisdiction in this class of cases; and the court is convinced that the learned judges who decided the Reaves Case, supra, being a case of desertion, would not have so held under the facts and circumstances of this case. Much of the confusion that apparently exists respecting the subject under consideration arises, in the estimation of the court, either from confounding cases where, as at common law, there was no statutory inhibition in favor of the parent against the enlistment, and such contracts were valid, or cases instituted by the minor personally, with those inaugurated by the parent, or from a misapprehension of the two decisions of the Supreme Court of the United States (Ex parte Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; Morrissey v. Perry, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644), and in the effort to apply the principles there decided, under the peculiar facts and circumstances of those cases, to a case like the one under consideration here. Both cases were for desertion of the most aggravated character, in which the deserters themselves, two adults, were seeking to claim the exemptions prescribed by the statute.

In the Grimley Case, the petitioner was 40 years old at the time of his enlistment, and swore he was under 35, the prescribed maximum age

Digitized by Google

to enter the service, and after desertion and arrest therefor he endeavored to secure his discharge on the ground that he was not subject to enlistment, because he was too old; and the court rightfully held that, as his relation with the government was a contractual one of a kind that changed his status, such defense might be interposed by the government, but not by him. In discussing this case the court did say that while in the army he was a soldier de jure, as well as de facto, and subject to military jurisdiction and authority, and that the civil courts on habeas corpus were confined to the ascertainment of the jurisdiction of the court, and not to a review of its proceedings; still there is nothing new in the latter proposition, and the same should not preclude a parent from securing the discharge of his child, enlisted without his consent, as well after as before court-martial. In re Carver (C. C.) 103 Fed. 624, 626. A parent under such circumstances in no manner asks a review of the court-martial proceedings. They remain in all respects valid as to the child. The parent says he is not bound by them, since he was not a party to them, and that the child is no less and no more in the navy after court-martial proceedings than before, and that so far as he is concerned he is illegally detained in the service, in contravention of the plain acts of Congress, and he is entitled to his discharge. Moreover, in deciding this case, it will be observed that the court, speaking through Mr. Justice Brewer, said:

"By enlistment the citizen becomes a soldier. His relations to the state and the public are changed. He acquires a new status, with correlative rights and duties; and, although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the state not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the state, would not have entered into the new relations with him, or permitted him to change his status. Of course, these considerations may not apply where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables a party from changing his status or entering into new relations."

In Morrissey v. Perry, supra, the deserter entered the service by reason of a false oath while under the prescribed age, and continued therein less than a month, deserted, and remained away for 5½ years, and until he had attained his majority, when he was arrested for desertion, and sought by habeas corpus to secure his release, because he was not of the requisite age when he enlisted. The court refused the relief sought, holding that the contract of enlistment was valid so far as the child was concerned; the parents making no claim in his behalf. Mr. Justice Brewer, also speaking for the court in that case, said:

"Section 1117, Rev. St. [U. S. Comp. St. 1901, p. 813], provides that 'no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States, without the written consent of his parents or guardians: Provided, that such minor has such parents or guardians entitled to his custody and control.' But this provision is for the benefit of the parent or guardian. It means simply that the government will not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court and secure the restoration of a minor to his or her control; but it gives no privilege to the minor. * * * The contract of enlistment was good so far as the petitioner is concerned. He was not only de facto,

Digitized by Google

but de jure, a soldier, amenable to military jurisdiction. His mother not interfering, he was bound to remain in the service."

These two cases, while upholding fully the contract of enlistment between the soldier and the government, having proper regard to the vigor and efficiency of the army and navy and the necessity of maintaining the same, expressly recognize the validity of every contention here made in behalf of the parents' right. In the Grimley Case the court said:

"These considerations may not apply, where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables the party from changing his status."

And the court, in the further progress of the opinion, emphasized the fact of the invalidity of such contracts, when there existed a natural wrong in the manner in which they were entered into. Can there be a doubt in this case that there not only existed the element of infancy, but the express disability arising from the provisions of the act of Congress which invalidated the contract so far as the parent not consenting to the enlistment was concerned? Surely the manner in which the same was effected by the false oath of the infant was, as to the parent, a natural wrong inherent in the inception of the undertaking.

The Morrissey Case could not well have been stronger in its recognition of the parent's rights. It says in clear and unambiguous language that the provision in question was for the benefit of the parent or guardian, and, not content with that, emphasized what was meant, and how the right could be secured:

"It means simply that the government will not disturb the control of the parent or guardian over his or her child, without consent. It gives the right to such parent or guardian to invoke the aid of the court to secure the restoration of the minor to his or her control."

Further, the court, discussing the minor's status, said:

"He is not only de facto, but de jure, a soldier, amenable to military discipline. His mother not interfering, he was bound to remain in the service."

This has but one meaning—that, his mother intervening, he was not bound to remain in the service; that the parent or guardian was entitled to his control, and upon the court's intervention he should be restored to them.

The Circuit Court of Appeals for this Circuit, in the case of Solomon, Sheriff, v. Davenport, 87 Fed. 318, 30 C. C. A. 664, took the same view of the law, namely, that the exemption of the statute was one which the parent could avail of, but not the soldier, and refused to discharge the soldier. If it be said that these decisions do not maintain the position here contended for on the part of the parents for the release of this minor child, to whose enlistment they had not assented, surely they cannot be said to maintain the government's position in this case. Here we have no deserter, no infraction of military discipline, but merely a case where parents, finding their minor child enlisted in the navy in plain violation of law, within 10 days of such enlistment are beseeching the government for his release. This is met, not by the reply that "You shall have him, since we were im-

Digitized by Google

posed on, and are manifestly not entitled to him," but, on the contrary, by the cold answer that "To make known your request, to press your demands, means only that he will be proceeded against by court-martial for an offense of fraudulent enlistment, which will defeat your right of restoration." The law, it would seem in this case, is too simple and plain that any such result as this should be brought about, either from anything contained in its letter or spirit. It is as follows (section 1419, Rev. St. [U. S. Comp. St. 1901, p. 1007]):

"Minors between the ages of 14 and 18 years shall not be enlisted in the naval service without consent of their parents or guardians."

This language admits of no cavil or doubt as to its meaning; and to say that a parent seeking to secure possession of his child, wrongfully taken into the navy in contravention of this act, is to be refused and denied such right in the manner here contended for, would be substantially to nullify the law by reason of a court-martial proceeding inaugurated by one wrongdoer against the other—would be in effect to use the law enacted for the parents' benefit, as a medium for their punishment. In re Davison (C. C.) 21 Fed. 618; In re Baker (C. C.) 23 Fed. 30; In re Carver (C. C.) 103 Fed. 624.

Judge Jones, of the Middle District of Alabama, in Ex parte Reaves (C. C.) 121 Fed. 848, being the decision of the lower court in the case above cited, in an elaborate and exceptionally able opinion, discussing this particular phase of the distortion of this act of Congress, said:

"It is a maxim of the law that no power can be exercised indirectly which cannot be lawfully exercised directly, and whether or not the exercise of the power is lawful must be tested and determined 'by its ordinary and natural effect' upon the right against which the exercise of the power is directed. Henderson v. Mayor, 92 U. S. 259, 23 L. Ed. 543; Joseph v. Randolph, 71 Ala. 499, 46 Am. Rep. 347. If the minor, by doing a wrongful act as against the father, and the government, by doing a further wrong to the father, in attempting to enforce an enlistment made in violation of his wishes, can impress upon the minor, in behalf of the government, as against the father, a status which suspends for any period of time the parent's right to the custody and control of his minor child, it results inevitably that the joint wrong of the minor and the government forfeits, in favor of the government, the wrongdoer, as against the innocent and nonassenting father, rights the statute intended to preserve and safeguard for the father. If this is not doing by indirection what cannot be done directly, it is impossible to present an illustration which would violate the maxim. Magdalen College Case, Coke's Reports, vol. 11, p. 66; Wells v. People, 71 Ill. 532."

The law under consideration was enacted in behalf of the parents and guardians, to the end that their children, of whom they were the natural guardians and protectors, or who were under their lawful direction, should not be wrested from their care and control. Manifestly such an act of Congress should be given a reasonable and liberal interpretation, in order that its purpose and intent, its humane provisions, may not be frustrated and destroyed. The lawmaking power surely went far enough in the interest of the public, and of the possible necessities of the army and navy, when it provided for enlistment of 14 year old children at all; and the prerequisite that the assent of the parent or guardian should be required would seem to have been dictated by the plainest principles of humanity. The desirability

Digitized by Google

of maintaining the strength and efficiency of the military branch of the government is fully appreciated; but, in dealing with this prescribed class of possible recruits, the act of Congress in question, and its manifest purpose and intent, has to be taken into account, and the necessities, certainly in time of peace, cannot be such that those of this class of tender years, between 14 and 18, have to be held in the public service without the consent of their parents or guardians, in plain violation of the act of Congress.

The seriousness, importance, and far-reaching consequences of the questions involved to the parents of the land, cannot be well overestimated. What has happened to the petitioners in this case is liable to take place with any other parents; and if the government's contention be the correct view of the law, then, so far as this large and most unfortunate class of the youth of the land are concerned, the control of parents and guardians must give way to that of the army and navy officials, who, in the nature of things, cannot deal with those committed to them either as children or individuals, but must treat all alike as soldiers; and for the care, love, and affection of tender parents, mother and father, and other loved ones, will be substituted that of the military command, enforceable by the rude decrees of a court-martial. Wayward children are the ones for whom parents ever have the greatest anxiety and solicitude; and to deny to them their right to the care and control of such children, unless required so to do by the plain mandate of the law, would seem to be harsh in the extreme.

The infant, Alfred F. Bakley, will be discharged.

L. L. Lewis, U. S. Atty. (Ro. H. Talley, Asst. U. S. Atty., on the brief), for appellant.

Mary Philbrook, for appellees.

Before PRITCHARD, Circuit Judge, and McDOWELL, District Judge.

PER CURIAM. We have carefully considered the questions involved in this case, and we find no error in the rulings of the learned judge who tried the case below. Therefore we affirm the judgment of the court below, fully concurring in the opinion.

Digitized by Google

(152 Fed. 1022.)

KEAN v. DICKINSON.

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907.)

No. 699.

BANKRUPTCY—STOCKBROKER—TITLE TO STOCKS PURCHASED FOR CUSTOMER.

A stockbroker who purchases and carries stocks on account of a customer on margins furnished by such customer, holds the same as pledgee, and on his bankruptcy the customer is entitled to the stock on payment of the amount due thereon, or to the surplus realized from its sale by the trustee, to the exclusion of the bankrupt's creditors.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 207.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond.

In Bankruptcy. Appeal from a decree sustaining exceptions to report of referee.

The opinion filed below, and here reprinted from 147 Fed. 786, was in full as follows:

WADDILL, District Judge. In involuntary bankruptcy proceedings regularly inaugurated, Wyndham Bolling, a stockbroker doing business in the city of Richmond, Va., was duly adjudicated a bankrupt. His assets consisted mainly of the value of surplus margins in certain stocks held by him. Included in said assets were 500 shares of the stock known as "Steel Common," and on which there was a margin in hand, as ascertained by the sale thereof, of $2,175.74. Upon the bankruptcy of said Bolling, Emmet Dickinson, a customer, at once interposed his claim to said stock, and subsequently filed his formal petition asserting ownership thereof, by insisting that the same was purchased for and carried on his account, and that in carrying the same he had lost thousands of dollars; and praying that any sums arising from the sale of said particular stock should be decreed to him as his property; he being the owner thereof.

The question raised by the petition of said Dickinson involves his status respecting the steel stock in question; that is to say, whether, as between himself and his broker, the ordinary relation of debtor and creditor existed, or he occupied the more favorable position of a pledgor of said stock. The questions arising on the petition were referred to the referee, who duly took evidence thereon, and reported adversely to the claim of the petitioner. The case is now before the court upon a review of the finding and decision of the referee. After a most careful consideration of the entire subject, and of the able and elaborate arguments of counsel, the conclusion reached by the court is that the referee erred in his ruling, both upon the question of law and fact; and that, therefore, the exceptions to his finding should be sustained. The evidence, in the view taken by the court, indisputably establishes the fact that the steel stock in question was purchased by the bankrupt, Bolling, on account of the petitioner Dickinson; and that the same was carried by him for Dickinson; that the latter furnished the money with which to buy and carry the same; and that, under such circumstances, Dickinson,

Digitized by Google

who furnished the money, should be entitled to any surplus margin on this stock, instead of the general creditors of Bolling. There would seem to be no good reason in principle why this should not be the case, and that so inequitable a result should be worked out by the court as would follow if it decreed the money arising from the surplus margin to the general creditors of Bolling, who paid nothing on account of the stock, instead of to Dickinson, who paid for and carried the same. The court is largely influenced in reaching this conclusion by a careful consideration of the case of Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102, 110, 117, a decision of the Supreme Court of Errors of the state of Connecticut, which contains an exhaustive review of the subject of the ownership of and right to surplus margins due on stock carried by a broker for his customer, upon the failure of the former.

In discussing the effect of the view contrary to the one here taken, Prentice, J., speaking for the court, said (26 Atl. 879, 21 L. R. A. 111):

"So long as the interpretation of the contract preserves as its distinctive feature the principal proposition that the customer purchases merely the right to have delivery to him in the future, at his option, of stocks or securities at the price of the day of the agreement, and its corollary that the customer derives no right, title, or interest in the stocks or securities until final performance, the difficulties in the way of harmonizing the situation are bound to exist. The fundamental difficulty grows out of the necessary attempt in some way to transform the customer, who enjoys all the incidents, and assumes all the risks of ownership, into a person who in fact has no right, title, or interest, and to create out of the broker, who enjoys none of the incidents of ownership, and assumes not a particle of its responsibility, a person clothed with a full title and an absolute ownership."

And subsequently in the same case (26 Atl. 881, 21 L. R. A. 113), in discussing the status of the customer, and demonstrating that he occupies the position of pledgor of the stock purchased, as distinguished from an ordinary debtor, the same learned judge, referring to the leading New York case, and the authorities generally bearing on the subject, says:

"The leading case upon this subject in New York is Markham v. Jaudon, 41 N. Y. 235. The opinion of the court in that case delivered by Chief Justice Hunt, contains an analysis of the obligations of the parties to a margin-purchasing contract which is so exhaustive, and so in consonance with our views, in so far as it relates to the questions involved in this case, that we quote it in full, together with some further pertinent observations of the court, as follows: 'The broker undertakes and agrees (1) at once to buy for the customer the stock indicated; (2) to advance all the money required for the purchases beyond the ten per cent. furnished by the customer; (3) to carry or hold such stocks for the benefit of the customer so long as the margin of 10 per cent. is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer, and not of the broker; (4) at all times to have in his name and under his control ready for delivery, the shares purchased, or an equal amount of other shares of the same stock; (5) to deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or (6) to sell such shares, upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract the customer undertakes (1) to pay a margin of 10 per cent. on the current market value of the shares; (2) to keep good such margin according to the fluctuations of the market; (3) to take the shares so purchased on his order whenever required by the

Digitized by Google

broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker. The position of the broker is twofold. Upon the order of the customer he purchases shares of stocks desired by him. This is a clear act of agency. To complete the purchase he advances from his own funds for the benefit of the purchaser, 90 per cent. of the purchase money. Quite as clearly he does not in this act as an agent, but assumes a new position. He also holds or carries the stock for the benefit of the purchaser until a sale is made by the order of the purchaser, or upon his own action. In thus holding or carrying he stands also upon a different ground from that of a broker or agent, whose office is simply to buy and sell. To advance money for the purchase, and to hold and carry stocks, is not the act of a broker as such. In so doing he enters upon a new duty, obtains other rights, and is subject to additional responsibilities.' The conclusion of the court is that this new relation is that of pledgor and pledgee. This doctrine has been adopted and approved by a long line of New York cases, among which are the following: Stenton v. Jerome, 54 N. Y. 480; Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80; Gruman v. Smith, 81 N. Y. 25; Capron v. Thompson, 86 N. Y. 418; Gillett v. Whiting, 120 N. Y. 402, 24 N. E. 790; Willard v. White, 56 Hun, 581, 10 N. Y. Supp. 170. The Supreme Court of Illinois has held in accordance with the rule in New York. Brewster v. Van Liew, 119 Ill. 554, 8 N. E. 842. The text-writers have adopted this view. Dos Passos, Stockbrokers, 112; Cook, Stock & Stockholders, § 457; Jones, Pledges, 495; 18 Am. & Eng. Ency. Law, 707; Colebrooke, Collateral Securities, § 306; Overton, Liens, 205."

To the entire opinion of Judge Prentice, the court refers as containing a clear, able, and comprehensive exposition of the law on the subject, and one which from its reasoning and results the court feels clearly should be followed in the present case.

Counsel for the trustee earnestly insist that the settled rule of decisions under the existing bankruptcy act, respecting the status of stockbrokers and their customers, is that they occupy the relation of ordinary debtor and creditor, as distinguished from that of pledgor and pledgee; and, in support of their contention, refer to the following decisions: In re Swift, 105 Fed. 493, 5 Am. Bankr. Rep. 335, affirmed 112 Fed. 315, 50 C. C. A. 264, 7 Am. Bankr. Rep. 375; In re Topliff, 114 Fed. 323, 8 Am. Bankr. Rep. 141; In re Gaylord, 113 Fed. 131, 7 Am. Bankr. Rep. 577. A careful review of these cases, will not, in the judgment of the court, sustain them in their view. The case of In re Swift, which in its essential features was unlike the one under consideration, was from the District Court of the state of Massachusetts, and as well in the lower court as in the Circuit Court of Appeals, turned largely, if not entirely, upon the state law of Massachusetts regarding the class of creditors under consideration, namely, that the relation of debtor and creditor existed, which doctrine should control in the federal court in cases in that state. The Topliff Case, also a decision from Massachusetts, turned upon the question of whether a creditor of the class in question, should be allowed to prove his debt against the bankrupt's estate, without surrendering certain preferential payments received by him within four months of the bankruptcy; and the conclusion reached under the then proved facts and circumstances, whatever might be the character of the claim, was that the doctrine respecting preferential payments did not apply to it. The Gaylord Case was a decision of the District Court of the Eastern District of Missouri, also involving the question of preferential payments, as in the Massachusetts case last cited. The customer of the stockbroker

Digitized by Google

was seeking to prove a debt against the bankrupt's estate, and the question was whether, before so doing, certain payments received by him within four months prior to the bankruptcy should be surrendered; and the court held that, before making such proof, this should be done. But these decisions, or certainly the questions necessary to be decided in each of them, in no manner precludes the question presented by this record. The petitioner, Dickinson, is not seeking to prove a debt against the bankrupt's estate. He claims that a particular stock carried by another broker on account of the bankrupt, the latter having executed his orders with New York through a broker having a direct wire, was stock bought for him, on his account, and for which he had paid; that it was his stock, and that the surplus margin belonged to him, and not to the bankrupt's estate, nor subject to the demands of the general creditors.

No case like the one under consideration has been cited by counsel, and the court believes that none can be found, where so inequitable a doctrine would be sanctioned as would result in a denial of the petitioner's claim, after proof of the fact that the stock was bought and carried on his account, and paid for with his money. While it is true the referee found against the petitioner, being of opinion that he had not supplied evidence sufficient to establish his claim to the fund in question, according to the ordinary method of tracing trust funds, still the court feels constrained to differ from this finding, taking into account the peculiar relation sought to be maintained. The transaction in this case was but an ordinary stockbroker's agency in the purchase and carrying of stock upon margin. Neither the petitioner nor the bankrupt ever actually handled the particular stock bought; but petitioner gave his orders to purchase stock on margin to the bankrupt, in the ordinary course of such speculative transactions, and the evidence he furnishes establishes as conclusively, as it is ever possible to trace this class of dealing, the fact of the purchase made on his account, and of the payments made by him to carry the stock. The broker received only a commission on the transaction; and to deny to this petitioner the right of recovery under the circumstances of this case, would clearly be to hold that a purchaser of stock on margins could under no circumstances recover back what had been unexpended of the amount advanced by him, on the stock, in the event of the failure of the middleman, the broker.

The exceptions to the referee's report will be sustained, and a decree entered in favor of the petitioner, Dickinson, for the amount admitted by the parties to be $2,175.74, with costs.

Legh R. Page (W. J. Leake, on the brief), for appellant.
G. A. Hanson, for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. The opinion of the trial court is entirely in consonance with our views, and it is hereby adopted as the opinion of this court. Affirmed.

Digitized by Google

(151 Fed. 1022.)

THE TENEDOS.

(Circuit Court of Appeals, Second Circuit. January 7, 1907.)

Nos. 110–114.

1. SHIPPING—DAMAGE TO CARGO—UNSEAWORTHINESS FROM LEAKING PORT.
If a ship starts on a voyage with a port negligently left open, causing damage to cargo, her owners are liable for failing to provide a ship seaworthy at the beginning of the voyage, and are not protected by section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), on the ground that the fault was one in navigation or the management of the vessel, although proper appliances for closing the ports were furnished; and this rule is especially applicable where the ports were so located as to be submerged when the vessel was fully loaded.

2. SAME—LIABILITY OF OWNERS—FAILURE TO EXERCISE DUE DILIGENCE.
A steamship originally constructed for passengers, but later used for the carriage of goods, had ports in the lower between-decks, which were submerged when she was fully loaded. These were equipped with glass bull's-eyes, and shutters for properly closing the same. On commencing to load cargo at Batoum the ports in a compartment were examined and found properly closed, and the compartment was then partially filled with wool. The vessel stopped at a number of other ports on the Black Sea and the Mediterranean, and took on more cargo; the hatchway leading to such compartment being used, and finally closed when she started on the voyage for New York. Shortly afterward water was discovered in the hold under such compartment, and on examination it was found that one of the glass bull's-eyes had been stolen, and that the water had entered through such port and damaged the cargo. The brass pins holding the bull's-eyes in a number of the other ports had also been removed. No inspection of the ports had been made after the loading commenced at Batoum. *Held*, that due diligence on the part of the owners to render the vessel seaworthy when she commenced the voyage required that such inspection should have been made the last thing before access to the ports was cut off, and that the damage to cargo was due to unseaworthiness for which the vessel was liable.

Appeals from the District Court of the United States for the Southern District of New York.

In Admiralty. Suits to recover for damage to cargo.

Libelants obtained a decree below and from that decision this appeal is taken.

The opinion filed below, and her reprinted from 137 Fed. 443, was in full as follows:

HOLT, District Judge. These suits are brought to recover for damages to a portion of the cargo of the steamship Tenedos, caused by water leaking through a port. The Tenedos was originally built for a passenger steamer, and subsequently used as a freight steamer. She had four hatches. No. 3 hatch had four compartments. At the bottom was the hold; then the lower between-decks; then the upper between-decks; then the spar deck. In the lower between-decks compartment of this hatch there were ten ports—five on each side—placed within a few inches of the floor above. They were constructed in the usual manner of ports on modern vessels. The port was circular, and fitted with a glass bull's-eye, with a brass rim, opening horizontally on a hinge, to

Digitized by Google

afford light and air. The port was also fitted with an iron disk or blind, which, when the port was not used, was placed in the bottom of the porthole, flush with the outside of the ship, and slightly fastened with red-lead putty. Against this disk the glass bull's-eye was closed and bolted fast. Then over the glass bull's-eye was brought down an iron shutter, swinging from a hinge above the port, and that inside shutter was bolted at the bottom. The shutter was smaller than the bull's-eye, so that, when closed, the brass rim of the bull's-eye was visible. The ports in No. 3 lower between-decks were 21 feet 6 inches above the keel, and the vessel, when fully loaded with cargo, drew a little more than that, so that when the vessel was fully loaded these ports were submerged. All the ports in the vessel were overhauled and put in good order at Hamburg in May, 1903. The vessel thereafter came to New York, and took in a cargo of grain, which she discharged at Alexandria in good order. She then proceeded light to Batoum. When she arrived at Batoum a careful examination of the ports was made by the first officer and the carpenter, to see that they were tight and secure, and they were found to be so. Two or three days afterwards wool in bales was loaded into No. 3 lower between-decks, until that compartment, except the hatchway, was substantially full; but, the bales being of different sizes, there were spaces between the top of the wool and the floor above, varying from one to two feet, over which a person could crawl until he came to the side of the vessel, and to the ports there. After leaving Batoum, the vessel called at various ports on the Black Sea and the Mediterranean. At some of these ports she loaded cargo into the hold of No. 3, and it was not until she was nearly ready to sail for New York that No. 3 hatch was so full that no one could get through it into the between-decks compartment. She completed her cargo at Patras, Greece, and sailed from there for New York on September 30th. On October 5th ten feet of water was discovered in the hold of No. 3 hatch. The ship thereupon started her pumps, and ran for Algiers, where she arrived the next day. There it was found upon examination, after removing the cargo from No. 3, that from nine of the ten ports in the lower between-decks compartment the brass pin upon which the hinge of the bull's-eye turned had been removed; that on various ports were marks and scratches apparently made by some sharp tool or instrument; and that in the after port, on the starboard side, the bull's-eye itself was missing, the inner iron shutter having been afterwards closed again and bolted. This left no support for the outer iron disk or plate, and it had worked loose and fallen in against the inner iron shutter, permitting the water to leak through the port; thus damaging a large portion of the cargo in the hold and the lower between-decks. There is no direct proof in this case how this bull's-eye and the brass pins were removed. I think that the necessary inference is that they were stolen by a thief, who probably was not a member of the crew, after the ports were inspected at Batoum.

The bull's-eye could not have been removed after the hatches were closed. It follows that it must have been removed before the

Digitized by Google

Tenedos sailed from Patras for New York. She was therefore unseaworthy when she sailed. The question, therefore, both under the bills of lading and the Harter act, is whether her owners used due diligence to make her seaworthy. The burden of proof upon that question, unseaworthiness at the time of sailing being established, is on the owners. The Edwin I. Morrison, 153 U. S. 199, 215, 14 Sup. Ct. 823, 38 L. Ed. 688; The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65. The diligence imposed upon a shipowner to see that the vessel is seaworthy before starting upon a voyage is spoken of in the case of The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130, as the utmost care and diligence; and, clearly, due diligence calls for especial attention at those points where the likelihood or possibility of unseaworthiness is most obvious. The port in question was submerged when the ship was fully loaded with cargo. It seems to me clear, therefore, that the shipowners were bound to exercise a very high degree of diligence to make sure that such a port, which would be submerged during the whole of her return voyage to New York, was secure. The owners of the Tenedos provided entirely proper ports. They were properly overhauled and put in perfect order at Hamburg, and they were properly examined at Batoum, and found to be then in perfect order and securely fastened. Two or three days passed at Batoum before the wool was loaded in the lower between-decks of No. 3 hatch, and the compartment, except the space of the hatchway, was then filled with wool up to within one or two feet of the floor above. The vessel then sailed from Batoum, calling at a number of other ports, at some of which cargo was placed in the hold of No. 3 hatch. The hatch does not seem to have been filled up so that no one could get into No. 3 lower between-decks until shortly before the Tenedos sailed from Patras for New York. Cargo was loaded in the hold of No. 3 at Constantinople, Smyrna, Kalamata, Patras, and Katakolo. The claimant contends that the theft of the brass pins and the bull's-eye did not take place at Batoum, but probably took place at Patras or some other of the Greek ports last visited, because there were other thefts of articles on the ship at Patras, and the Patras merchants loaded their goods there with their own men, which was not the custom at other ports. But I do not see that there is any adequate proof that this theft took place in any particular port, and it seems to me that it could have been more easily accomplished at Batoum, during the two or three days after the ports were inspected, and before the wool was put in, than at any of the later ports, after the No. 3 lower between-decks was filled with wool. If the theft took place at Batoum, before the wool was put in, I think it clear that due diligence was not used to discover it. Certainly it seems to me that due diligence is not shown in examining the ports of a vessel, if, at the end of the work of filling the compartment in which the ports are, a careful search is not made to see that the ports have not been opened, and are in good condition and are properly secured, and particularly if the ports are so situated that when the ship is loaded they will be submerged. If the theft took place after the wool was placed in the lower be-

Digitized by Google

tween-decks, the omission to inspect the ports further before sailing is undoubtedly not so obvious an omission of due diligence. It is testified that when cargo was being loaded there was always a watchman on duty about the compartment, and an officer tallying the cargo, and that the hatches were always put on at night, and a watchman on duty on deck. But at all the ports at which cargo was put in No. 3 hold, under the wool, the hatchway was open, with an iron ladder leading down to the hold. A man going to or coming from the hold could step off upon and crawl over the wool in the lower between-decks to the ports, and although it may be admitted that the officers of the Tenedos were not bound to be on the watch for such an extraordinary and unprecedented theft as occurred in this case, it does not seem to me too strict a rule to hold that they were bound, before finally closing the hatches and starting on a voyage across the Atlantic, to make a final inspection of the ports—particularly those that would be submerged—in order to be sure that they were secure. Such ports are sometimes opened by workmen for air or light. If they were not fastened securely, they, of course, would admit water to the ship, and they were the most obvious source of danger in that respect. While, therefore, I do not think that the officers of the Tenedos were negligent in omitting to suspect thefts of the kind which occurred, I think that they did not exercise due diligence in sailing for New York without making a final inspection of the ports, from the inside of the vessel, before finally closing the hatches in each compartment. If they had done so, with proper light, either from the open hatch or a lantern, they could hardly have failed to notice the absence of the brass rim of the bull's-eye, which must have caused the interior appearance of the port from which the bull's-eye had been stolen to be noticeably different from the others. At all events, it cannot be assumed that they would not. I think the evidence shows, too, that the absence of the brass pin from the bull's-eye hinge in all of the ports but one in that compartment could have been seen upon inspection, and, although it is possible that, if such an inspection had been made, the thefts would not have been discovered, it nevertheless seems to me that the entire neglect of any inspection of these ports after the inspection made the first day the ship arrived at Batoum shows that due diligence was not exercised to make this vessel seaworthy.

Evidence was given for the Tenedos, by three experienced captains, which is claimed to show that there was as much examination of the ports made in this case as on other vessels. But the fact that shipowners are not in the habit of using precautions which would demonstrate unseaworthiness is immaterial. They are bound to use them. The Edwin I. Morrison, 153 U. S. 217, 14 Sup. Ct. 823, 38 L. Ed. 688. Of the witnesses called, however, two admitted that they considered it the duty of the officers of such a vessel to examine the ports at each stage of a voyage before leaving port. No such examination took place in this case after the vessel left Batoum, although she stopped at a number of different ports in the Levant. In cases in which ports have been negligently left

Digitized by Google

unclosed by the crew before sailing, it has been held that due diligence was not shown by proof that they were inspected and found in order before the work of loading ended, but that they should have been inspected the last thing before the hatches were closed or the voyage begun. International Nav. Co. v. Farr & Bailey Co., 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830; The Manitoba (D. C.) 104 Fed. 145.

The claimant's counsel argues that the owners did their duty in furnishing proper ports, and that the omission of the officers to keep them properly closed, or to discover that they had been tampered with, was a fault in the navigation or management of the ship, within the meaning of the third section of the Harter act (Act Feb. 13, 1893, c. 105 [U. S. Comp. St. 1901, p. 2946]). This view was apparently held at one time by the United States Supreme Court. The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241. But that court later distinguished that case, and it is now well settled that if a ship starts on a voyage with a port negligently left open, causing damage, her owners are liable for failing to provide a ship seaworthy at the beginning of the voyage. International Nav. Co. v. Farr & Bailey Co., 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830. And I think that, in the case of ports situated so low in the vessel as to be submerged when the vessel is fully loaded, such a rule is especially applicable. Such ports can have, under such circumstances, no function as ports. They are simply part of the side of the ship, and must be made as secure against leakage as the rest of the hull.

My conclusion is that the libelants are entitled to a decree, the amount of the damage to be ascertained upon a reference.

Harrington Putnam, for appellants.

Lawrence Kneeland, J. Tanner, and Black & Kneeland, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Decrees of District Court affirmed, with interest and costs, upon opinion of Judge Holt.

MEMORANDUM DECISIONS.

(153 Fed. 1020.)

AMERICAN FINE ART CO. v. SIMON. (Circuit Court of Appeals, Second Circuit. April 30, 1907.) No. 215. In Error to the Circuit Court of the United States for the Western District of New York. Judgment was entered upon a verdict in favor of the defendant. The cause has been twice tried. The first trial also resulted in a verdict for the defendant, but a new trial was ordered by this court because of error in the admission of testimony offered by the defendant upon an erroneous issue of fraud. The opinion on the first writ of error is reported in 140 Fed. 529, 72 C. C. A. 45. W. H.

Digitized by Google

Hotchkiss, Theodore Kronshage, Hotchkiss & Bush, and Kronshage, McGovern & Fritz, for plaintiff in error. Adelbert Moot, Charles Diebold, Jr., and Moot, Sprague, Brownell & Marcy, for defendant in error. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The facts are sufficiently stated in our former opinion and need not be repeated here. We endeavored to construe the contract in its entirety for the guidance of the court on the new trial which was ordered. That construction was reached after careful consideration, and we have no reason to believe that our interpretation is incorrect. In speaking of the obligation of the plaintiff under the contract Judge Townsend says: "Defendant, on his part, merely contracted to make a contract if he should thereafter see fit to do so. So far as he was concerned, there was no enforceable existing contract. The occurrence in future of an uncertain event after the signing of the written contract was a condition precedent to the giving of any order. The contract provided that, even if he approved a design, he was at liberty to decrease the amount specified in the contract, and that, if the parties failed to agree as to price, he was not bound to take any work of that design. There was, therefore, originally merely a unilateral contract, binding only upon the plaintiff, and there was no ambiguity or uncertainty as to its provisions." On the second trial the court excluded all evidence of fraud, which we thought was improperly admitted on the first trial, and submitted to the jury in a clear and impartial charge the question of fact arising on the contract, namely: Did the defendant so accept and approve the designs, etc., that such acceptance and approval constituted orders according to the terms and conditions of the contract? There was a sharp conflict of testimony upon this issue, but the jury answered the question in the negative. Their verdict was not against the weight of evidence, and must be accepted as establishing the fact that the approvals of the defendant were given to facilitate the copyrighting of the designs, and were not orders for work. The charge fairly presented the issue as follows: "If you believe from the evidence that the signatures of the defendant to the designs submitted to him were not, as claimed by him, to carry out the contract mentioned in the complaint, but were in fact merely to authorize copyrighting, then the plaintiff cannot recover in this action; for in that event it proceeded to lithograph the finished designs without any orders or directions to do so by defendant, and accordingly the loss or damage is that of the plaintiff. * * * As I stated in the beginning of my charge, the question presented to you is in a very narrow range. It is simply whether these approvals of Mr. Simon, that were given in the manner stated, were for the purpose of ordering the work, or whether, as the defendant claims, they were for the purpose of copyrighting, and that question, as I have already intimated, must be left to you." We have examined the other exceptions of which error is predicated, and are convinced that none of them is well taken. We think the trial was fairly conducted throughout, the record disclosing no error which would justify a third trial of the issue. The judgment is affirmed, with costs.

(153 Fed. 1021.)

CLEMENT v. WILSON. (Circuit Court of Appeals, Second Circuit. May 10, 1907.) No. 281. In Error to the Circuit Court of the United States for the District of Vermont. Alexander Dunnett and Wm. B. C. Stickney, for plaintiff in error. Max L. Powell, for defendant in error. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Judgment affirmed. See 126 Fed. 808.

(153 Fed. 1021.)

HANOVER NAT. BANK OF CITY OF NEW YORK v. SUDDATH. (Circuit Court of Appeals, Second Circuit. April 30, 1907.) No. 264. In Error to the Circuit Court of the United States for the Southern District of New York. A judgment for $3,802.29 was entered in the Circuit Court for the Southern

Digitized by Google

District of New York, upon a verdict directed by the court in favor of defendant in error, who was plaintiff below. Percy S. Dudley, for plaintiff in error. Edward B. Whitney, for defendant in error. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This action was before us upon a previous writ of error. Van Zandt v. Hanover Nat. Bank, 79 C. C. A. 23, 149 Fed. 127. The present record, mutatis mutandis, is identical with that on the former review. The only differences relate to immaterial changes occasioned by the lapse of time. The facts are the same, and no reason has been advanced which induces us to change our view of the law. The judgment is affirmed.

(153 Fed. 1022.)

HANOVER NAT. BANK OF CITY OF NEW YORK v. SUDDATH. (Circuit Court of Appeals, Second Circuit. April 30, 1907.) No. 265. Appeal from the Circuit Court of the United States for the Southern District of New York. Percy S. Dudley, for appellant. Edward B. Whitney, for appellee. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This is an equity action, brought by the Hanover National Bank against William F. Suddath, as receiver of the American National Bank of Abilene, Tex. The relief prayed for is: First, that an accounting be ordered to ascertain the amount due to the complainant, and that the amount so found may be set off against any amount found to be due from the complainant to the defendant; second, that the defendant be enjoined from the further prosecution of any action at law based upon the notes referred to in the bill. The facts sufficiently appear in the opinion of this court in Van Zandt v. Hanover Nat. Bank, 149 Fed. 127, 79 C. C. A. 23. It is manifest that if the Hanover Bank was unauthorized to use the notes sent to it by the Abilene Bank, except for the specific purpose mentioned in the letter of instructions transmitting them, this action cannot succeed. The mere fact that property of the Abilene Bank was temporarily in the hands of the Hanover Bank did not give the latter a right to apply that property in payment of the former's overdraft. The Hanover Bank was under no legal obligation to pay the checks of the Abilene Bank, when that bank had no balance on deposit with which to meet the checks. The Hanover Bank, in paying these checks and thus creating an overdraft, undoubtedly acted from the most praiseworthy motives; but the failure of the Abilene Bank on the succeeding day subjected its property, wherever situated, to the payment of the claims of its creditors. In the Van Zandt Case this court said: "The notes in controversy were never deposited by the Abilene Bank with defendant, nor did they come into its hands as collateral security within the commonly accepted meaning of these terms. They were temporarily in the hands of the defendant under an option to purchase them. We conclude that they did not come within the terms of the pledge, and that the defendant did not obtain a lien upon them. If the check drawn by the Abilene Bank upon the defendant, which caused the overdraft of its accounts, had been drawn with knowledge of the defendant's refusal to discount the notes, a different question would be presented; but it is fair to assume that this check was drawn in the expectation that before its presentation the notes would have been discounted and the proceeds credited to the Abilene Bank." The decree is affirmed.

(153 Fed. 1022.)

THE STAMFORD. (Circuit Court of Appeals, Second Circuit. May 10, 1907.) No. 284. Appeal from the District Court of the United States for the Southern District of New York. Harrington Putnam, Henry E. Mattison, and Wing, Putnam & Burlingham, for appellants. James J. Macklin and La Roy S. Gove, for appellee. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decree (148 Fed. 509) affirmed, with interest and costs.

Digitized by Google

(153 Fed. 1023.)

THE VIOLETTA. THE SCOWS 8, 20, AND 7. (Circuit Court of Appeals, Second Circuit. April 30, 1907.) No. 224. Appeal from the District Court of the United States for the Southern District of New York. A decree of the District Court held the tug and the barge Thomas L. Parker both in fault for a collision between the latter and a mud scow in tow of the tug. The opinion below is reported in 141 Fed. 690, and sets forth the facts quite fully. E. G. Benedict and Benedict & Benedict, for appellant. Frederick M. Brown and Butler, Notman & Mynderse, for appellees. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. As the barge has not appealed, the only question before us is as to the fault of the tug. It is sufficient to say that we concur in the findings and conclusion of the District Judge. The suggestion that the barge, after she left the tow and until she finally swung to her anchor, was a steam vessel—i. e., "a vessel propelled by machinery"—and required to navigate accordingly, although she had no motive power, nor means to regulate her course and speed, except by anchoring, does not commend itself. We find the evidence of the master of the tug unsatisfactory, and not consistent with the blue print submitted as indicating his course. It seems entirely clear that for some time after he started, and after the barge had cast off from the tow, he failed to keep a careful lookout. There was no one else on board who was standing lookout. We are not convinced by appellant's argument that observation of the movements of the barge would have failed to advise the observer that she was a barge dropped by her tow on anchorage ground and about to anchor; and perceiving that, a careful navigator would not have persisted in swinging to the southward, but would have adhered to what he says was his original and usual intention "to get on the New York shore [or, rather, on the New York side of anchorage ground] before straightening down at all." The decree is affirmed, but without interest from date of appeal, and with costs of this court to the barge Parker.

END OF CASES IN VOL. 82.

Digitized by Google

INDEX.

ABANDONMENT.

Of particular species of property or rights.

See "Patents," § 1.
Mining privileges, see "Mines and Minerals," § 1.
Right of way of railroad, see "Railroads," § 1.

ABUTTING OWNERS.

Compensation for taking of or injury to lands or easements for public use, see "Eminent Domain," § 1.

ACCEPTANCE.

Of goods sold in general, see "Sales," § 3.

ACCORD AND SATISFACTION.

See "Payment."

ACCOUNT.

Accounting by agents, see "Principal and Agent," § 1.

ACKNOWLEDGMENT.

Operation and effect of admissions as evidence, see "Criminal Law," § 8.

ACTION.

Jurisdiction of courts, see "Courts."

Actions between parties in particular relations.

See "Master and Servant," §§ 1, 2.

Actions by or against particular classes of persons.

See "Carriers," §§ 2, 3; "Municipal Corporations," § 2; "Principal and Agent," § 1; "Railroads," § 3.
Legatee, see "Wills," § 1.
Stockholders, see "Corporations," § 2.
Trustee in bankruptcy, see "Bankruptcy," § 5.

Digitized by Google

Particular causes or grounds of action.

See "Collision," § 6; "Death," § 1; "Negligence," § 2.
Death caused by operation of railroad, see "Railroads," § 3.
Death of servant, see "Master and Servant," § 1.
Infringement of patent, see "Patents," § 3.
Infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 1.
Injury to tow, see "Towage."
Loss of cargo of vessel, see "Shipping," § 2.
Personal injuries, see "Carriers," § 3; "Electricity"; "Master and Servant," § 1; "Shipping," § 1.
Unfair competition in trade, see "Trade-Marks and Trade-Names," § 1.

Particular forms of special relief.

See "Injunction"; "Specific Performance."
Foreclosure of vendor's lien on land sold, see "Vendor and Purchaser," § 3.

Particular proceedings in actions.

See "Costs"; "Damages"; "Evidence"; "Judgment"; "Jury"; "Parties"; "Pleading"; "Removal of Causes"; "Trial."
Verdict, see "Trial," § 4.

Particular remedies in or incident to actions.

See "Injunction"; "Set-Off and Counterclaim."

Proceedings in exercise of special or limited jurisdictions.

Criminal prosecutions, see "Criminal Law."
Suits in admiralty, see "Collision," § 6.
Suits in equity, see "Equity."

Review of proceedings.

See "Appeal and Error"; "Exceptions, Bill of."

ADEQUATE REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1.
Effect on jurisdiction of equity in action against legatee, see "Wills," § 1.

ADJOINING LANDOWNERS.

See "Boundaries."

ADJUDICATION.

Operation and effect of former adjudication, see "Judgment," § 1.

ADJUSTMENT.

Of loss within insurance policy, see "Insurance," § 2.

ADMINISTRATION.

Of estate of bankrupt, see "Bankruptcy," § 4.

Digitized by Google

ADMIRALTY.

See "Collision"; "Maritime Liens"; "Shipping"; "Towage."

ADMISSIONS.

In pleading, see "Pleading," § 2.

ADVANCES.

To principal as affecting liability of surety, see "Principal and Surety," § 2.

AFFREIGHTMENT.

Contracts, see "Shipping," § 2.

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

AMENDMENT.

Of particular acts, instruments, or proceedings.

See "Statutes," § 3.
Pending bills, see "Statutes," § 1.
Pleading in equity, see "Equity," § 2.
Record on appeal or writ of error, see "Appeal and Error," § 4.
Verdict in civil action, see "Trial," § 4.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Courts," § 2.

ANSWER.

In pleading, see "Pleading," § 2.

APPEAL AND ERROR.

See "Exceptions, Bill of."
Costs, see "Costs," § 2.
Review of criminal prosecutions, see "Criminal Law," § 6.

§ 1. **Decisions reviewable.**
Complainant, having obtained an injunction against the maintenance of certain suits in a state court affecting its water rights and right to cut off service in order to coerce payment of back debts, filed a bill, the object of which was to have defendants made parties to the original bills, and to obtain against them a perpetual injunction restraining further pros-

Digitized by Google

ecution of certain suits which defendants had brought in a state court for the same purpose. *Held*, that an order modifying a temporary restraining order against defendants, so as to permit them to prosecute their suits in the state court with reference to questions not determined in the prior proceedings, but not determining the cause on the merits nor ordering that the bill or motion be dismissed, was not a final order from which an appeal could be taken.

—Vicksburg Waterworks Co. v. City of Vicksburg, 153 Fed. 116..... 82 C. C. A. 250

A judgment of compulsory nonsuit, entered by a federal court in Pennsylvania in conformity to the state practice, is a final judgment, and reviewable on writ of error.

—Fadley v. Baltimore & O. R. Co., 153 Fed. 514.....82 C. C. A. 464

§ 2. Presentation and reservation in lower court of grounds of review.

Where a decree was entered in favor of a complainant in a suit in which because of the absence of an indispensable party whose rights were directly affected the court was not warranted in granting any relief, the defect of parties cannot be waived by the parties before the court, and the fact that no objection was made on that ground cannot prevent the consideration of the question by an appellate court.

—McConnell v. Dennis, 153 Fed. 547.....82 C. C. A. 501

§ 3. Requisites and proceedings for transfer of cause.

While a motion for new trial seasonably filed in an action at law in a Circuit Court prevents the judgment from becoming final until it is disposed of, time given for the allowance of a bill of exceptions has no such effect and cannot enlarge the time within which a writ of error must be brought, which, where the writ is returnable to the Circuit Court of Appeals, is limited to six months from the date of the final judgment.

—Kentucky Coal, Timber, Oil & Land Co. v. Howes, 153 Fed. 163.... 82 C. C. A. 337

An order allowing a writ of error conditioned on the giving of a bond by the plaintiff in error is ineffective until the condition is complied with.

—Kentucky Coal, Timber, Oil & Land Co. v. Howes, 153 Fed. 163.... 82 C. C. A. 337

A writ of error is not "brought" within the meaning of Rev. St. § 1008 [U. S. Comp. St. 1901, p. 715], until the writ is actually filed or lodged with the clerk of the court which rendered the judgment sought to be reviewed.

—Kentucky Coal, Timber, Oil & Land Co. v. Howes, 153 Fed. 163.... 82 C. C. A. 337

A writ of error must be served, and such service is made by depositing it with the clerk of the court which rendered the judgment.

—Kentucky Coal, Timber, Oil & Land Co. v. Howes, 153 Fed. 163.... 82 C. C. A. 337

While the clerk of a Circuit Court may issue a writ of error to that court under the statute, as well as the clerk of the appellate court, upon an order allowing the same, it is not his duty to do so unless requested, but it is the duty of the plaintiff in error to apply for the writ and to deposit it for filing when issued.

—Kentucky Coal, Timber, Oil & Land Co. v. Howes, 153 Fed. 163.... 82 C. C. A. 337

§ 4. Record and proceedings not in record.

A writ issued out of the federal court described plaintiff's citizenship, but omitted to state the citizenship of either of the three defendants. Defendants moved to dismiss for want of jurisdiction because of this omission, whereupon plaintiff asked leave to amend the writ by inserting after the description of the "plaintiffs" the words "citizens and residents of." This motion was allowed, all parties treating the word "plaintiffs" as in-

Digitized by Google

tended for "defendants," after which defendants, who were represented by the same counsel, filed a special plea denying that one of them was a citizen of Massachusetts, which plea was heard and overruled. *Held*, that the error in the motion to amend was unsubstantial, and that plaintiff, as defendant in error, was entitled to correct the record by substituting the word "defendants" for "plaintiffs."
—Brock v. Fuller Lumber Co., 153 Fed. 272.....82 C. C. A. 402

Where the testimony taken before a referee is not in the record as sent to an appellate court, his findings of fact, or upon mixed questions of law and fact, cannot be reviewed.
—W. M. Ritter Lumber Co. v. Lestershire Lumber & Box Co., 153 Fed. 575 .....82 C. C. A. 529

The record of a former trial of a case made a part of an agreed statement of facts on a second trial cannot be considered by an appellate court unless incorporated in a bill of exceptions or otherwise brought into the record sent to such court.
—Oxford & Coast Line R. Co. v. Union Bank of Richmond, Va., 153 Fed. 723 .....82 C. C. A. 609

§ 5. Assignment of errors.
An assignment of error, which, in violation of the rules of the court, includes different parts of a charge to the jury, cannot, after being held not well taken as to one part, be sustained as to another.
—Acme Food Co. v. Meier, 153 Fed. 74.....82 C. C. A. 208

§ 6. Review.
A motion for a new trial in a federal court is addressed to the sound discretion of the court, and its ruling thereon cannot be assigned as error.
—St. Louis Southwestern Ry. Co. v. Wainwright, 152 Fed. 624.....
82 C. C. A. 16

Where one engaged principally in farming made a mortgage upon a large part of his lands for $98,503.32 to secure a pre-existing debt within four months before he filed a voluntary petition in bankruptcy and the court below sustained it, *held* (1) where the court has considered conflicting evidence and made a finding or decree, it is presumptively correct, and, unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand; (2) no such error or mistake was disclosed by the record, and the finding of the court below, that the mortgagee did not have reasonable cause to believe that it was intended to give a preference by the mortgage, and that the mortgagor did not intend thereby to hinder, delay, or defraud any of his other creditors, must be affirmed.
—Coder v. Arts, 152 Fed. 943; In re Coder, Id.; In re Arts, Id.; Arts v. Coder, Id.....82 C. C. A. 91

In an action for injuries to plaintiff by defendant's runaway team, a witness testified that C., defendant's superintendent, was at the scene within a few minutes after the accident and identified the team as belonging to defendant, and, in reply to a general question as to what the superintendent said, the witness answered: "This is Armour's team that has done this, and we are liable." On objection, the court allowed the answer to stand de bene, and stated that he would instruct the jury, without further testimony, that it had no effect, and as to the question of liability it had no probative value. During the trial it was admitted that C. was defendant's local superintendent, and that the team belonged to defendant, and the court expressly charged that C.'s statement could not be considered at all as an admission of liability. *Held*, that defendant was not prejudiced, under such circumstances, by the admission of such answer.
—Armour & Co. v. Skene, 153 Fed. 241.....82 C. C. A. 385

Where, in an action for injuries to plaintiff by a collision with defendant's runaway team alleged to have been negligently permitted to remain unattended in a street, the evidence establishing the identity of the team

Digitized by Google

as belonging to defendant, and that the horse was left at the curbstone with the reins thrown over his back, and later started to run, and came into collision with plaintiff's vehicle and caused the injury, such facts warranted a verdict in favor of plaintiff, and hence defendant was not prejudiced by a technical error in the admission of evidence that the driver was relieved by defendant of his employment nearly a year after the accident.

—Armour & Co. v. Skene, 153 Fed. 241.....82 C. C. A. 385

The Circuit Court of Appeals has no jurisdiction to review an objection that the damages awarded in an action for wrongful death are excessive, though it is convinced that the trial court improperly exercised its discretion in refusing to grant defendant relief on such ground on the motion for a new trial.

—Chicago & N. W. Ry. Co. v. O'Brien, 153 Fed. 511..82 C. C. A. 461

An order granting a preliminary injunction will not be reversed by an appellate court, except for an abuse of discretion.

—Continuous Glass Press Co. v. Schmertz Wire Glass Co., 153 Fed. 577 .....82 C. C. A. 587

Where on writ of error in a suit to enforce a finding of the Interstate Commerce Commission, the record affirmatively showed that neither the Commission nor the Circuit Court based any part of the judgment sought to be reviewed on certain evidence admitted over objection, the admission of such evidence was harmless.

—Southern Ry. Co. v. St. Louis Hay & Grain Co., 153 Fed. 728..... 82 C. C. A. 614

§ 7. **Determination and disposition of cause.**

A mortgage having been executed by a husband and wife, suit was brought to foreclose the same, and a decree rendered charging the life estate of the wife, as widow of a former husband, as well as her after-acquired title to the remainder. This decree was reversed, in so far as it affected such after-acquired title, and the cause was remanded, with directions to render a decree charging the wife's life estate. *Held*, that such judgment constituted the law of the case so far as the wife's life estate was concerned, and that a decree following such mandate was not objectionable for failure of the Circuit Court to declare the decree without prejudice to the future determination of the nature and extent of the wife's interest in the premises at the date of the mortgage.

—Burns v. Cooper, 153 Fed. 148.....82 C. C. A. 300

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 1.

APPRAISAL.

Of merchandise subject to duty, see "Customs Duties," § 3.

ARCHITECTS.

Approval by as to performance of contract, see "Contracts," § 2.

ARMY AND NAVY.

Habeas corpus for custody of minor enlisting in navy, see "Habeas Corpus," § 1.

Digitized by Google

ARREST OF JUDGMENT.

In criminal prosecutions, see "Criminal Law," § 5.

ASSESSMENT.

On unpaid stock of bankrupt corporation, see "Bankruptcy," § 4.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 5; "Criminal Law," § 6.

ASSIGNMENTS.

Assignment of lease, see "Landlord and Tenant," § 1.
In bankruptcy, see "Bankruptcy," §§ 2–6.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," §§ 2–6.

ASSOCIATIONS.

Sufficiency of service on members as making association a party, see "Parties," § 1.

Where a voluntary association creates a subsidiary or branch association as an instrumentality through which to accomplish certain purposes, it is liable for the acts of such subsidiary association to the same extent as though such acts had been done by the entire membership.
—Evenson v. Spaulding, 150 Fed. 517..... 82 C. C. A. 263

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 1.

BAILMENT.

See "Carriers," § 2.

BANKRUPTCY.

Conclusiveness of judgment in action by trustee of bankrupt, see "Judgment," § 1.
Of corporation, see "Corporations," § 2.
Sufficiency of consideration of bankrupt's note, see "Bills and Notes," § 1.

§ 1. Petition, adjudication, warrant, and custody of property.
Defendant, at the time he made certain alleged preferential payments in order to continue in business and avoid suit, was indebted to about $20,000, and his salable property did not exceed $1,500. Much of his indebtedness was not due, and he possessed a knowledge of a rather technical business and a custom or good will which was valuable. He did

Digitized by Google

not regard himself as doomed to failure but expected to continue in business and meet his obligations as they matured. The payments were of $160 and $121.15, respectively, made to bona fide creditors in the ordinary course of business. *Held*, that such payments were not made with intent to prefer, required by Bankr. Act 1898, c. 541, 30 Stat. 544, § 3, cl. 2 [U. S. Comp. St. 1901, p. 3422], and did not therefore constitute acts of bankruptcy.

—Goodlander-Robertson Lumber Co. v. Atwood, 152 Fed. 978..... 82 C. C. A. 109

Solvency at the time of the filing of a petition in involuntary bankruptcy is important as a defense only when the act of bankruptcy charged is the conveyance, transfer, or concealment of property with intent to hinder, delay, or defraud creditors, under Bankr. Act July 1, 1898, § 3 (1), c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]. If the act of bankruptcy charged is the giving or permitting of a preference under subdivisions 2 or 3, insolvency must have existed at the time of the preference and solvency or insolvency at the time of the filing of the petition can only have a reflex importance as evidence.

—Acme Food Co. v. Meier, 153 Fed. 74.....82 C. C. A. 208

Where conveyances of property by an alleged bankrupt are charged as acts of bankruptcy, under both subdivisions 1 and 2 of section 3, Bankr. Act July 1, 1898, c. 541, 30 Stat 546 [U. S. Comp. St. 1901, p. 3422], as made with intent to defraud and also as preferences, the value of the property thus conveyed is not to be computed in determining the question of solvency at the time of the filing of the petition as a defense under the first subdivision, but, if the conveyances are found not to have been fraudulent, the value of such property is to be considered in determining the question of solvency or insolvency when the conveyances were made under subdivision 2.

—Acme Food Co. v. Meier, 153 Fed. 74.....82 C. C. A. 208

Bona fide conveyances intended only to secure indebtedness or to secure the grantees as sureties of the grantor do not constitute acts of bankruptcy under Bankruptcy Act July 1, 1898, § 3 (1), c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], and where such conveyances, made by warranty deed, are charged as fraudulent under said subdivision, and also as preferences under subdivision 2, it is competent for the defendant to show by parol that they were given merely as security both for the purpose of showing the absence of a fraudulent intent, and also that the value of the property may be considered on the question of insolvency in determining whether or not the conveyances were preferential; and it is immaterial that the issues are tried to a jury.

—Acme Food Co. v. Meier, 153 Fed. 74.....82 C. C. A. 208

On a bankrupt's adjudication, the debtor's entire nonexempt estate is in legal contemplation brought into custodia legis and appropriated to the payment of his debts as effectually as if taken in execution or attachment, subject to the qualification, except as otherwise provided, that the property is appropriated in the same condition and subject to the same equities as when in the possession of the bankrupt.

—In re Youngstrom, 153 Fed. 98.....82 C. C. A. 232

The owner of the stock of goods in a store turned the same over to his brother, who personally conducted the business thereafter under a company name, which was publicly used in all transactions relative to the business. It was originally the intention to form a corporation to own the business, the most of the stock to be issued in the first instance to the brother who owned the goods, but such intention was never carried out. *Held*, that there was a partnership in fact between the brothers in the business, which might be adjudged a bankrupt, and which was the owner of the property and assets of the business.

—Manson v. Williams, 153 Fed. 525.....82 C. C. A. 475

Where a petition in involuntary bankruptcy alleged that the two defendants owned a stock of goods as partners, and that therefore a partner-

Digitized by Google

ship existed which it was prayed might be adjudged a bankrupt, and such adjudication was made, it was a conclusive determination of the ownership of the stock of goods as between the parties to the proceeding, but could not bind the trustees in bankruptcy of one of the alleged partners, who had taken possession of and sold the goods as assets of his individual estate, and who were not permitted to become parties to the partnership proceeding.
—Manson v. Williams, 153 Fed. 525.....82 C. C. A. 475

§ 2. Assignment, administration, and distribution of bankrupt's estate—Assignment, and title, rights, and remedies of trustee in general.

On the appointment and qualification of a bankrupt's trustee, the title to the bankrupt's property is vested in him as of the date of the adjudication.
—In re Youngstrom, 153 Fed. 98.....82 C. C. A. 232

Where a corporation, at the time it became a bankrupt, could have laid an assessment on certain of its stockholders, whose stock was not full paid, such right passed by the bankruptcy to the trustee.
—In re Remington Automobile & Motor Co., 153 Fed. 345..... 82 C. C. A. 421

A stockbroker who purchases and carries stocks on account of a customer on margins furnished by such customer, holds the same as pledgee, and on his bankruptcy the customer is entitled to the stock on payment of the amount due thereon, or to the surplus realized from its sale by the trustee, to the exclusion of the bankrupt's creditors.
—Kean v. Dickinson, 152 Fed. 1022.....82 C. C. A. 667

§ 3. —— Preferences and transfers by bankrupt, and attachments and other liens.

A transfer by an insolvent, within four months prior to the filing of a petition, for the purpose of securing or paying a pre-existing debt, without any intent or purpose to affect other creditors injuriously beyond the necessary effect of the security, is lawful, if not violative of other provisions of law, and it does not evidence any intent to hinder, delay, or defraud creditors within the meaning of Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].
—Coder v. Arts, 152 Fed. 943; In re Coder, Id.; In re Arts, Id.; Arts v. Coder, Id.....82 C. C. A. 91

A transfer or mortgage made by a person adjudged a bankrupt, to secure a pre-existing debt, within four months of the filing of the petition, is not void, under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], unless it was either made with the intent on his part to hinder, delay, or defraud his creditors, or some of them, or is held void as against his creditors by the laws of the state, territory, or district in which the property is situated.
—Coder v. Arts, 152 Fed. 943; In re Coder, Id.; In re Arts, Id.; Arts v. Coder, Id.....82 C. C. A. 91

The transfer specified in Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], includes a mortgage or a lien voluntarily created by the debtor. If such a mortgage or lien creates a preference under section 60a, it is nevertheless not voidable under section 60b unless the creditor who receives it or is benefited thereby, had reasonable cause to believe that it was intended to give a preference by it.
—Coder v. Arts, 152 Fed. 943; In re Coder, Id.; In re Arts, Id.; Arts v. Coder, Id.....82 C. C. A. 91

A debtor stated to his creditor on December 24, 1903, that his property was worth $246,750, and that he owed only $36,000. On May 2, 1904, he made a mortgage on a part of his property for $98,503.32 to another creditor. On June 13, 1904, he made another statement to his creditor that his property was worth $254,740, and that he owed $195,400, of which

Digitized by Google

$147,500 was secured by mortgages upon his real estate. Thereupon, the creditor to secure its claim for $22,000, took from him three mortgages which together covered substantially all the debtor's unexempt property except a few hogs and horses, including his tools, machinery, and crops. and the debtor, who was then insolvent, thereby gave a preference under section 60a of the bankruptcy law, Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. *Held*, the creditor had reasonable cause to believe when it took the mortgages that it was intended thereby to give a preference.

—Coder v. McPherson, 152 Fed. 951; In re Coder, Id...82 C. C. A. 99

The owners of coal lands entered into a contract by which they leased the same, and by which the lessee engaged to supply to a railroad company all of the coal required on certain lines of its road at stated prices, the company on its part agreeing to pay for the coal delivered during each calendar month on the 15th of the following month. The railroad company was given power to terminate the lease on a failure of the lessee to comply with such contract, and the lease was made assignable only with its consent. The lease was assigned to a coal company which fulfilled the contract for a number of years. Becoming short of money, the railroad company advanced it money to meet its pay rolls under an oral agreement that the advances should be repaid by the subsequent delivery of coal under the contract. While still owing such advances, the coal company was adjudicated a bankrupt, and its receivers and subsequently its trustees continued to deliver coal under the contract, but refused to allow the advances. *Held*, that the oral agreement was in effect a waiver by the railroad company of its right to withhold payment until after delivery, and the advances constituted a payment in advance for coal to be delivered under the contract and a pledge of the coal when mined, which was valid as against the bankrupt and its trustees, who had assumed and continued performance of the contract.

—Atchison, T. & S. F. Ry. Co. v. Hurley, 153 Fed. 503..... 82 C. C. A. 453

The administration and distribution of the property of bankrupts is a proceeding in equity, and should be conducted on broad equitable lines, with a view of recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal or equitable or both.

—Atchison, T. & S. F. Ry. Co. v. Hurley, 153 Fed. 503..... 82 C. C. A. 453

A trustee in bankruptcy stands in the shoes of the bankrupt, and whatever rights a third party had against the property of the bankrupt before adjudication that party, in the absence of fraud or fixed liens created by state statutes in favor of others, has against his estate in bankruptcy.

—Atchison, T. & S. F. Ry. Co. v. Hurley, 153 Fed. 503..... 82 C. C. A. 453

It is only where new sales succeed payments, and the net result is to increase the value of the estate, that payments made by an insolvent debtor on a running account are not to be considered as preferential transfers, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], which must be surrendered, under section 57g, before the creditor can prove the remainder of his claim.

—Joseph Wild & Co. v. Provident Life & Trust Co., 153 Fed. 562.... 82 C. C. A. 516

Ky. St. 1903, § 2494, which provides that "no lien provided for in this article" shall attach, unless a claim therefor is filed in the county clerk's office within 60 days after the last day of the last month in which any labor was performed or material was furnished for which the lien is claimed, refers solely to liens provided for in section 2492 for labor or materials furnished in the construction of works of public improvement, and has no application to the liens given by section 2487 for materials or supplies furnished to a manufacturing company in case of the distribution of its property among creditors, notwithstanding the general lan-

Digitized by Google

guage "lien provided for in this article"; the two classes of liens having their origin in different statutes, which with a third were carried without substantial change into the article in question, and sections 2492 to 2495 inclusive comprising one of the prior acts, while section 2487 formed part of another.
—In re Bennett, 153 Fed. 673.....82 C. C. A. 531

§ 4. —— **Administration of estate.**
Where a trustee sells mortgaged property of the bankrupt free of the mortgage, and the proceeds thereof are sufficient for that purpose, the mortgagee is entitled to the payment of the interest upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage.
—Coder v. Arts, 152 Fed. 943; In re Coder, Id.; In re Arts, Id.; Arts v. Coder, Id.....82 C. C. A. 91

The rule relating to the powers of ordinary judicial tribunals, limiting summary proceedings to the term at which judgment is entered, does not apply to proceedings in bankruptcy, in which the court may, at any time before the close of the proceedings, set aside orders previously made.
—In re Tucker, 153 Fed. 91; Tucker v. Curtin, Id....82 C. C. A. 225

A sale of property by a trustee in bankruptcy was set aside by an order directing a resale of the property "free and discharged of and from all incumbrances," and requiring the petitioner to give security to bid an advanced price offered, and, in addition, such sum as might be awarded to the prior purchaser. Pending an appeal from such order the court vacated a prior order staying execution on a decree of foreclosure previously entered in a state court, but requiring the petitioner, with its consent, to make a similar bid at the foreclosure sale. It became the purchaser at such sale at a price largely in excess of that which it had undertaken to bid. *Held*, that it was entitled to the property free of incumbrance, the same as though the sale had been made by the bankruptcy court; and that the amount awarded to the former purchaser, and the costs in connection therewith, as well as the accumulated taxes on the property, should be paid by the trustees from the proceeds of the sale.
—In re Wylie, 153 Fed. 281.....82 C. C. A. 411

Where, at the time a corporation became a bankrupt, certain of its stock issued was not full paid, the bankruptcy court, on the petition of the bankrupt's trustee for leave to levy an assessment on such stockholders, was bound to determine whether, at the time of the issue of any particular share, the full value was or was not paid in, whether any subsequent payments had been made on account thereof, whether the corporation was indebted in excess of assets, and the amount of such indebtedness.
—In re Remington Automobile & Motor Co., 153 Fed. 345.....
82 C. C. A. 421

An order authorizing the trustee of a bankrupt corporation to levy an assessment on certain of the corporation's unpaid stock should not provide for execution against the stockholders for the respective amounts found due on such assessment, which was collectible only by plenary action against the stockholders.
—In re Remington Automobile & Motor Co., 153 Fed. 345.....
82 C. C. A. 421

On an application of the trustee of a bankrupt corporation for leave to levy an assessment on unpaid stock, the corporation's indebtedness was properly proved by presentation of the proofs of claim.
—In re Remington Automobile & Motor Co., 153 Fed. 345.....
82 C. C. A. 421

While trustees in bankruptcy are not bound to accept property or take over contracts which are onerous and unprofitable, they are required to elect whether to assume an existing executory contract and to continue its performance and ultimately dispose of it for the benefit of the estate, or to renounce it, and leave the injured party to such legal remedies for

Digitized by Google

the breach as the case affords. If they elect to assume a contract, they take it cum onere, as the bankrupt held it, subject to all of its provisions and conditions, and any valid modification of a written contract which may have been made by the bankrupt before adjudication, whether oral or in writing, and whether known or unknown to the trustees, will be binding upon them.

—Atchison, T. & S. F. Ry. Co. v. Hurley, 153 Fed. 503..... 82 C. C. A. 453

§ 5. —— Actions by or against trustee.

Where a payment made by a bankrupt was in discharge of a valid obligation, the burden was on the bankrupt's trustee seeking to recover the same to show that the creditor paid had reasonable cause to believe that the bankrupt intended thereby to give a preference, as required by Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].

—Calhoun County Bank v. Cain, 152 Fed. 983.....82 C. C. A. 114

§ 6. —— Claims against and distribution of estate.

A claim which is given priority by Bankr. Act July 1, 1898, c. 541, § 64b(5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], because of a state statute by which the right of priority is given to the debt, and not to the creditor, may be assigned before bankruptcy, and the right of priority will pass to the assignee.

—In re Bennett, 153 Fed. 673.....82 C. C. A. 531

While a state law cannot of its own force determine priorities under a national bankruptcy law, Bankr. Act July 1, 1898, c. 541, § 64b(5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], which provides that "debts owing to any person who by the laws of the state * * * is entitled to priority" shall be given priority in the distribution of the bankrupt's estate, adopts the law of the state, and makes it the applicable federal law in determining priorities.

—In re Bennett, 153 Fed. 673.....82 C. C. A. 531

Ky. St. 1903, § 2487, which provides, inter alia, that persons who shall have furnished materials or supplies for the carrying on of the business of any manufacturing company shall have a lien therefor on its property and effects involved in the business, when the same shall be assigned for the benefit of creditors, or shall in any way come to be distributed among creditors, whether by operation of law or by act of such company, which lien, as provided by following sections, is superior to any mortgage or incumbrance thereafter created, while it may not create a technical lien until the happening of one of the conditions mentioned, gives a substantial right in or inchoate lien upon the property from the date of the furnishing of the material or supplies which comes within the spirit and purpose of Bankr. Act July 1, 1898, c. 541, § 64b(5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], and on the bankruptcy of the company entitles such a claim to priority over the claims of general creditors.

—In re Bennett, 153 Fed. 673.....82 C. C. A. 531

§ 7. Composition.

A contract by a bank to advance the money to pay a composition made by a bankrupt, in part consideration for which it was to receive payment of its own debt in full, is illegal, and will not support an action by the bank to recover from another creditor the amount he received under the composition, and which by such contract, to which he was a party, he agreed to return to the bank.

—McCormick v. Solinsky, 152 Fed. 984.....82 C. C. A. 134

§ 8. Rights, remedies, and discharge of bankrupt.

Mills' Ann. St. Colo. § 2562, exempts to a debtor who is the head of a family stock in trade not exceeding $200 in value, and section 2563 declares that, when the head of a family shall die, desert, or cease to reside with the same, the family shall be entitled to receive all the benefits and privileges conferred on the head of the family residing with the

Digitized by Google

same. *Held*, that where a merchant became a bankrupt and absconded with the intention never to return and deserted his wife, who, with him, had constituted a family, she constituted what remained of the family, and was entitled to the $200 exemption from his stock in trade.
—In re Youngstrom, 153 Fed. 98.....82 C. C. A. 232

Mills' Ann. St. Colo. § 2133, provides that, to entitle any person to the benefit of a homestead exemption, he shall cause the word "homestead" to be entered in the margin of his record title to the same, which entry shall be signed and attested by the clerk and recorder of the county in which the premises are situated, and, if the property belongs to the husband, the entry may be made by the wife and vice versa. *Held*, that where the alleged homestead of a bankrupt had not been so designated on the record, when the bankruptcy petition was filed, at the time of the adjudication or the appointment and qualification of the trustee, the premises were not exempt under the state law, and could not be made exempt under Bankr. Act July 1, 1898, c. 541, §§ 621, 70a, 30 Stat. 548, 552, 565 [U. S. Comp. St. 1901, pp. 3424, 3430, 3452], providing for the vesting of the bankrupt's property in the trustee and for the setting apart of exemptions.
—In re Youngstrom, 153 Fed. 98.....82 C. C. A. 232

Under Bankr. Act July 1, 1898, c. 541, § 14b (6), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]), which makes it a ground for refusing a discharge that the bankrupt "in the course of the proceedings in bankruptcy refused * * * to answer any material question approved by the court," no more formal approval is required from the referee than the overruling of objections, if any are made, and the allowance of the questions, and the refusal of a bankrupt on his examination to answer a question as to what was done with a large sum of money drawn by him from the bank a short time before the bankruptcy, is sufficient to warrant the refusal of a discharge, although after such objection to the discharge was made he offered to answer the question.
—In re Weinreb, 153 Fed. 363.....82 C. C. A. 439

§ 9. Appeal and revision of proceedings.

An order of a court of bankruptcy confirming an order of a referee denying a claim of certain exemptions asserted by the bankrupt's wife, not being an order made specially appealable by Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], was reviewable on a petition to revise, presented within the six months generally limited for invoking the appellate jurisdiction of the Circuit Court of Appeals by Act Cong. March 3, 1891, c. 517, § 11, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552].
—In re Youngstrom, 153 Fed. 98.....82 C. C. A. 232

An order of a court of bankruptcy passing upon the claim of a creditor for the allowance of counsel fees and expenses incurred in contesting claims and prosecuting suits on behalf of the estate is not one allowing or rejecting a "debt or claim" against the estate within the meaning of Bankr. Act July 1, 1898, c. 541, § 25a (3), 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], and appealable thereunder, but is an administrative order reviewable only on petition to revise in matter of law under section 24b.
—Ohio Valley Bank Co. v. Switzer, 153 Fed. 362....82 C. C. A. 438

BENEFICIAL ASSOCIATIONS.

See "Associations."

BEQUESTS.

See "Wills."

Digitized by Google

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF EXCHANGE.

See "Bills and Notes."

BILL OF LADING.

See "Carriers," §§ 1, 2.

BILLS AND NOTES.

Notes of street railroad company, see "Street Railroads," § 1.

§ 1. Requisites and validity.

The P. S. Company, being insolvent, instead of liquidating, formed a new corporation, which subsequently became bankrupt, conveying a substantial portion of the assets of the P. S. Company to the new corporation, in payment of capital stock. Claimant, a creditor of the P. S. Company, had been demanding payment, and, after the reorganization, proposed that the balance of the P. S. Company's assets be transferred to the new corporation, in consideration of certain notes of the latter which should be transferred by the new corporation to claimant as security for its debt, threatening otherwise to sue to wind up both corporations. The notes were executed as agreed, but no additional property was transferred from the P. S. Company to the bankrupt. *Held*, that claimant's promise to forbear suit against both corporations constituted a sufficient consideration for the bankrupt's notes.

—Beebe v. Wells, 153 Fed. 133; In re Federation Shoe Co., Id..... 82 C. C. A. 285

BONA FIDE PURCHASERS.

Of corporate stock, see "Corporations," § 2.
Of school district bonds, see "Schools and School Districts," § 1.

BONDS.

Conclusiveness of judgment in action on, see "Judgment," § 1.
Decision of state courts in action on railroad bond as rule of decision in United States court, see "Courts," § 2.
Enforcement of judgment in action on, see "Judgment," § 2.
Issuance of, by street railroad company, see "Street Railroads," § 1.
Issues raised by pleading in action on, see "Pleading," § 2.
Municipal bonds, see "Municipal Corporations," § 1.
Right to trial by jury in action on, see "Jury," § 1.
School district bonds, see "Schools and School Districts," § 1.
Sureties on bonds, see "Principal and Surety."

BOUNDARIES.

§ 1. Description.

In a case of disputed boundary, where the proof goes to the extent of showing that part of the survey was made on the ground, the calls may be

Digitized by Google

reversed and the lines traced the other way, whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant.
—W. T. Carter & Bro. v. Kirby Lumber Co., 152 Fed. 622..... 82 C. C. A. 14

BREACH.

Of contract, see "Contracts," § 2.
Of warranty, see "Sales," § 4.

BROKERS.

Bankruptcy of, see "Bankruptcy," § 2.
Confused or misleading instructions in action for compensation, see "Trial," § 3.
Reception of evidence in action for compensation, see "Trial," § 1.

BUILDING CONTRACTS.

See "Principal and Surety."

CANCELLATION OF INSTRUMENTS.

Grounds for cancellation or rescission of particular instruments.

Contracts for sale of realty, see "Vendor and Purchaser," § 2.
Lease, see "Landlord and Tenant," § 1.
Mining contracts, see "Mines and Minerals," § 1.

CARGO.

See "Shipping."

CARRIERS.

Carriage of goods by vessels, see "Shipping," § 2.

§ 1. Control and regulation of common carriers.

A rebate or a concession from a part of a single rate, whereby property is transported thereunder at a less rate than the established rate, is a concession from the entire rate, and renders all transportation thereunder illegal.
—Armour Packing Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id.....82 C. C. A. 135

The rates of transportation from places in the United States to ports of transhipment, and from ports of entry to places in the United States, of property in foreign commerce carried under through bills of lading, are required to be filed and published by the amended interstate commerce act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).
—Armour & Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. 82 C. C. A. 135

If carried under an aggregate through rate which is the sum of the ocean rate and the rate from or to a place in the United States to or from

Digitized by Google

the port of transhipment or of entry, the latter rate is required to be filed and published.

—Armour & Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. 82 C. C. A. 135

If carried under a joint through rate by virtue of a common control, management, or arrangement of the inland and ocean carriers, the joint rate is required to be filed and published.

—Armour & Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. 82 C. C. A. 135

A contract between a carrier and a shipper to transport the latter's goods in interstate or foreign commerce at the then established rate for a definite time is ineffective after a higher rate has been filed and published as required by law.

—Armour & Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. 82 C. C. A. 135

Such a contract constitutes no defense to a charge of giving or receiving a rebate or concession from the filed and published rate.

—Armour & Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. 82 C. C. A. 135

The giving or receiving of a rebate or concession, whereby property in interstate or foreign commerce is transported at a less rate than that legally filed and published, denounced by the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), is a continuous crime judicable in any court of the United States having jurisdiction of crimes through whose district the transportation is conducted.

—Armour Packing Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id.....82 C. C. A. 135

The giving or receiving of the rebate or concession, whereby property in interstate or foreign commerce is transported at less than the established rate, is the essence of the offense denounced by the pertinent paragraph of the Elkins act.

—Armour & Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. 82 C. C. A. 135

The "device" by which the concession or transportation is brought about is not an essential element of the crime, and it is unnecessary to plead it in an indictment.

—Armour & Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. 82 C. C. A. 135

The meaning of the clause "by any device whatever" in that paragraph is directly or indirectly, in any way whatever.

—Armour & Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. 82 C. C. A. 135

A carrier's rates on through business do not prove that a local rate is unreasonable, nor can the local rate throw light on the justice or injustice of discriminations between nonlocal shipments of the same origin and destination.

—Southern Ry. Co. v. St. Louis Hay & Grain Co., 153 Fed. 728.... 82 C. C. A. 614

An additional charge by a carrier of two cents per hundredweight for the privilege of reconsigning hay at East St. Louis, originating in northwestern territory and shipped into southeastern territory, was excessive, within

Digitized by Google

Interstate Commerce Act, § 1 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155]) prohibiting excessive rates, and thereby produced an unjust discrimination, in violation of sections 2 and 3.
—Southern Ry. Co. v. St. Louis Hay & Grain Co., 153 Fed. 728.... 82 C. C. A. 614

§ 2. Carriage of goods.
The time during which a rate different from the agreed rate is established by filing and publishing is excepted from the term of such a contract by virtue of the national acts to regulate commerce which are a part thereof.
—Armour & Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. 82 C. C. A. 135

A bill of lading provided that, in case of loss or damage to the goods, the carrier should have the benefit of any insurance for or on account of the owner, and should be subrogated to its rights before any demand on account of such loss or damage should be made. The shippers obtained a policy of insurance on the goods, conditioned that it should not inure directly or indirectly to the benefit of any carrier or bailee by stipulation in bill of lading or otherwise, and that it should be null and void to the extent of any amount recovered from any carrier or bailee. The goods having been lost by the carrier, the insurer advanced to the shippers an amount equal to the insurance, taking a receipt reciting that it was received "as a loan without interest, and repayable only to the extent of any net recovery we may make from the carriers responsible for the loss." *Held*, that the provision of the bill of lading did not obligate the shippers to insure for the benefit of the carrier, nor, if they did insure to effect, such insurance as would protect the carrier, but that they were free to procure the insurance they did; that the advance made by the insurance company was not a waiver of the conditions of its policy, and did not extinguish the liability of the carrier nor constitute a defense to an action against it to recover for the loss.
—Bradley v. Lehigh Valley R. Co., 153 Fed. 350....82 C. C. A. 426

§ 3. Carriage of passengers.
In an action against a railroad company to recover for a personal injury, the evidence was conflicting, but in one aspect tended to show that, while a vestibuled train of defendant was stopped to let off and take on passengers at a station platform where there was no depot or agent, plaintiff, after waiting until passengers came out, as required by defendant's rules, immediately started to go up the steps while the train was yet stationary and the vestibule doors open, intending and prepared to pay his fare and become a passenger; that, as he placed one foot on the step, the train suddenly started, and his other foot struck against a pile of freight on the platform in close proximity to the cars, and he was dragged from the steps under the car and injured. *Held*, that such evidence, if believed, warranted a finding that plaintiff was intending to take passage on the train, in which case he was entitled to the same protection as an accepted passenger and to a reasonable time to enter after the other passengers had alighted; that he acted with due care, and his injury was due solely to the negligence of defendant's servants in starting the train before he could do so: and that therefore it was not error to refuse to direct a verdict for defendant.
—St. Louis Southwestern Ry. Co. v. Wainwright, 152 Fed. 624.... 82 C. C. A. 16

Plaintiff's husband was struck and killed by a passing train at a station on defendant's railroad. In an action to recover damages for the death, the only testimony was that introduced by plaintiff, which was uncontradicted, and showed that the road was a double-track road, trains running west on the north track and east on the other, there being a space of 12 feet between the two; that there were platforms for passengers on the north side of the north track and on the south side of the south track, but no platform between; that decedent alighted from a west-bound train on the south side of the same in the daytime, and started across the south

Digitized by Google

track, when he was struck by an east-bound train thereon. The only witness to the accident was another passenger, an employé of defendant, who alighted on the same side in advance of decedent and crossed the south track ahead of the train. He testified that such train was in plain view and whistled, and also that he called and motioned to decedent to stay back, but that decedent started to run, and had reached the south rail when he was struck. There was no evidence of any invitation by defendant to passengers to alight on that side of trains, or that it had knowledge of any custom to do so; nor did decedent, who was a stranger to the place, have knowledge of any such custom, if it existed. *Held*, that the court properly directed a compulsory nonsuit on the ground of contributory negligence.

—Fadley v. Baltimore & O. R. Co., 153 Fed. 514....82 C. C. A. 464

CHANCERY.

See "Equity."

CHARACTER.

Of accused in criminal prosecutions, see "Criminal Law," § 3.

CHARGE.

To jury in civil actions, see "Trial," § 3.

CHATTELS.

See "Property."

CHECKS.

See "Bills and Notes."

CITIES.

See "Municipal Corporations."

CITIZENS.

Citizenship ground of jurisdiction of United States court, see "Removal of Causes," § 1.

CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 6.

CLUBS.

See "Associations."

COLLECTION.

Of assets of bankrupt, see "Bankruptcy," § 4.

COLLISION.

Of tow with stationary object, see "Towage."

Digitized by Google

§ 1. Rules and precautions for preventing collisions in general.

Rule 17 of the rules of navigation for the Great Lakes and their connecting waters (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 645 [U. S. Comp. St. 1901, p. 2891]), which provides that "when two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each shall pass on the port side of the other," has reference to the position of the two vessels when they will be meeting and about to pass each other, and not to their position when signals are given, if at that time they are on a temporary course from which they will depart before they will nearly approach each other.

—The William Chisholm, 153 Fed. 704; The Oceanica, Id.; Lehigh Valley Transp. Co. v. Chisholm, Id.....82 C. C. A. 562

§ 2. Steam vessels meeting or crossing.

A collision occurred at night in Lake St. Clair, a short distance below the lower end of the cut, between the steamships Oceanica, going up, and the Chisholm, coming down. The vessels were on the usual courses, which would bring them head on when they approached each other, and the night was calm and clear. There was evidence tending to show that signals for passing port to port in accordance with the rules were exchanged, although that was in dispute; but it was shown without contradiction that, when the vessels were some 1,500 feet apart and head on the Oceanica gave a signal of two blasts, which was assented to, and that the Chisholm then put her helm hard astarboard and swung to port. It was also satisfactorily shown that the Oceanica did not starboard her wheel, but either stopped and backed, or kept to the right, and that the collision occurred some distance to the eastward of her original course. *Held*, that she was clearly chargeable with fault adequate to account for the collision, and that under the rule, which in such case raises a presumption in favor of the other vessel, which can be rebutted only by clear proof of contributory fault, the Chisholm could not be held in fault.

—The William Chisholm, 153 Fed. 704; The Oceanica, Id.; Lehigh Valley Transp. Co. v. Chisholm, Id.....82 C. C. A. 562

§ 3. Steam vessels and sail vessels.

A steamer *held* solely in fault for a collision with a meeting schooner in the night near the mouth of Hampton Roads, where she saw the other vessel when two miles distant; it being her duty, as the burdened vessel and having ample sea room and fair weather, to so navigate as to avoid even danger of collision, and it not being established that the schooner changed either her course or speed until immediately before the collision.

—The Ann J. Trainer, 152 Fed. 1021; The Bayport, Id..... 82 C. C. A. 332

§ 4. Vessels at rest, at anchor, or at piers.

The William E. Reis, a large modern steamship, having on board 4,800 tons of iron ore, which lay moored for the winter at a dock in the Cuyahoga river, at Cleveland, broke from her moorings by reason of the parting of her lines during a flood following a heavy thaw, with rain, and drifted against and injured other vessels moored below. The river had been rising for two or three days, and due warning of the approaching flood had been given by the press. Only one person was kept on board as shipkeeper, and he was unable alone to manipulate the lines to equalize the strain thereon as the vessel was lifted by the rising water, and the evidence tended to show that the lines broke because of the unequal strain thereon. There were 50 other vessels moored in the river, none of which broke loose. *Held*, that such facts did not sustain the burden of proof resting on the vessel to show affirmatively that her drifting was the result of inevitable accident, or a vis major, which human precaution and a proper exercise of nautical skill could not have prevented, but that, whether or not her fastenings were originally sufficient, they ceased to be so when the flood came, especially in view of her great weight, and the

Digitized by Google

failure to take precautions to make and keep them so rendered her liable for the resulting damages.

—The William E. Reis, 152 Fed. 673; The John W. Moore, Id.; The Fanny Neil, Id.; The James B. Eads, Id.....82 C. C. A. 21

A vessel anchored at night in calm weather as the result of a previous collision in Hampton Roads in the middle of the channel, which was there a mile or more wide for seagoing vessels, was not chargeable with violation of section 15 of Act March 3, 1899, c. 425, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543], prohibiting vessels from anchoring in navigable channels in such manner as to prevent or obstruct the passage of other vessels; and, where she carried proper lights, and kept an anchor watch who gave due warning by signals to an approaching schooner, the latter was solely in fault for a collision between them.

—The Ann J. Trainer, 152 Fed. 1021; The Bayport, Id..... 82 C. C. A. 332

Defendant tug while going up a river to defendant's coal dock, which was located just below the dock to which plaintiff's boat was moored, collided with the outer of several floats attached to such dock, and the shock being communicated to each plaintiff was caught and injured as he was standing on a stringer in front of the bulkhead of the dock. The maneuver executed by the tug at the time of the collision was the usual one apart from the degree of violence of the contact, and it also appeared that the master of the tug, by reason of intervening cars on one of the floats, and plaintiff's stooping posture, could not have seen him, and did not know of his dangerous position. *Held*, that the master of the transfer was not negligent in adopting the maneuver executed at the time of the collision, nor in failing to discover plaintiff's presence either just prior to the collision or as the tug was approaching the dock at a time when plaintiff was in a place of safety.

—New York, N. H. & H. R. Co. v. De Noyelles, 153 Fed. 543..... 82 C. C. A. 497

A steamer *held* in fault for a collision between her tow and an anchored yacht on the anchorage grounds in East river in the evening, and the yacht *held* not chargeable with contributory fault because she was not ringing fog signals, in the absence of clear evidence that the weather conditions were such as to require it.

—Federal Ins. Co. v. Starin, 151 Fed. 1021.....82 C. C. A. 657

§ 5. Narrow channels, harbors, rivers, and canals.

Two steamships meeting in the Mississippi both *held* in fault for a collision, the descending vessel for giving the first passing signal contrary to the statutory rule, and after it had been accepted in giving a contrary signal, intended for another vessel astern of the first, but which was mistaken by the latter and acted on, directly contributing to the collision, the ascending vessel for so mistaking the second signal and acting on it, instead of sounding a danger signal and stopping until the signals were fully understood.

—The Ellis, 152 Fed. 981; The Galicia, Id.....82 C. C. A. 112

§ 6. Suits for damages.

In an action for injuries to plaintiff in a collision between defendant's tug and a series of floats attached to a dock, whether the master was negligent in causing his tug to come in violent contact with one of the floats without knowing that persons were not working in or around them, *held* for the jury.

—New York, N. H. & H. R. Co. v. De Noyelles, 153 Fed. 543..... 82 C. C. A. 497

In an action for injuries to plaintiff by a collision between defendant tug and one of several floats attached to a dock, whether plaintiff was negligent *held* for the jury.

—New York, N. H. & H. R. Co. v. De Noyelles, 153 Fed. 543..... 82 C. C. A. 497

Digitized by Google

The findings of a commissioner as to the damages recoverable for a collision, confirmed by the District Court, will not be disturbed on appeal, except for clear error.
—The William Chisholm, 153 Fed. 704; The Oceanica, Id.; Lehigh Valley Transp. Co. v. Chisholm, Id.....82 C. C. A. 562

COMBINATIONS.

See "Conspiracy"; "Monopolies," § 2.

COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."

§ 1. Power to regulate in general.
The amended interstate commerce act of 1887 does not lay a tax or duty on articles exported from any state within the meaning of paragraph 5 of section 9 of article 1 of the Constitution, and it is not obnoxious thereto.
—Armour Packing Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id.....82 C. C. A. 135

The amended interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) does not give a preference to the port of one state over those of another, within Const. art. 1, § 9, par. 5, and is not obnoxious thereto.
—Armour Packing Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id.....82 C. C. A. 135

§ 2. Interstate commerce commission.
The interstate commerce act (Act Feb. 4, 1887, c. 104, § 14, 24 Stat. 384, as amended by Act March 2, 1889, c. 382, § 4, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3165]) provides that, whenever an investigation shall be made by the commission, it shall make a report in writing which shall include the findings of fact on which the commission's conclusions are based, etc., and such findings shall thereafter be deemed prima facie evidence as to each and every fact found in all judicial proceedings. *Held* that, where a proceeding to enforce the commission's findings was tried to a federal court without a jury, it was not error for the court to receive the commission's report in evidence without excluding matters of opinion stated therein, as distinguished from the commission's findings of fact.
—Southern Ry. Co. v. St. Louis Hay & Grain Co., 153 Fed. 728.....
82 C. C. A. 614

A finding by the Interstate Commerce Commission that a just and reasonable charge for the privilege of reconsigning hay at East St. Louis was one cent per hundredweight was prima facie evidence of its own truth.
—Southern Ry. Co. v. St. Louis Hay & Grain Co., 153 Fed. 728.....
82 C. C. A. 614

COMMERCIAL PAPER.

See "Bills and Notes."

COMMISSION.

Interstate commerce commission, see "Commerce," § 2.

Digitized by Google

COMMISSIONERS.

Findings by commissioner as to damages recoverable for collision, see "Collision," § 6.
In equity, see "Equity," § 4.

COMMON CARRIERS.

See "Carriers."

COMMON SCHOOLS.

See "Schools and School Districts," § 1.

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 1.

COMPETENCY.

Of evidence in civil actions, see "Evidence," § 1.
Of witnesses in general, see "Witnesses," § 1.

COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § 1.

COMPLAINT.

In criminal prosecutions, see "Indictment and Information."

COMPOSITIONS WITH CREDITORS.

In bankruptcy proceedings, see "Bankruptcy," § 7

COMPROMISE AND SETTLEMENT.

See "Payment."

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales," § 5.

CONDITIONS.

In bills of lading, see "Carriers," § 2.
Of bill of exchange or promissory note, see "Bills and Notes," § 1.

Digitized by Google

CONSPIRACY.

Arrest of judgment in prosecution for conspiracy to defraud the United States of public lands, see "Criminal Law," § 5.
Combinations to monopolize trade, see "Monopolies," § 2.

§ 1. Criminal responsibility.

A conspiracy to defraud the United States of the possession of public lands by means of fraudulent homestead entries is within Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], although there is no purpose to carry the preliminary entries to final entry and patent.
—Stearns v. United States, 152 Fed. 900.....82 C. C. A. 48

An indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], which charges a conspiracy to defraud the United States of certain of its lands by means of false, forged, and fraudulent entries thereof under the homestead law, and avers that such lands were "in the district of lands subject to entry under the homestead laws of the United States" at a certain land office, and also in stating the acts done pursuant to such conspiracy charges the filing of applications for homestead entry of certain described "public lands of the United States subject to homestead entry," is not fatally defective, because in charging the conspiracy it does not expressly aver that the lands of which it was the purpose to defraud the United States were public lands, subject to homestead entry.
—Stearns v. United States, 152 Fed. 900.....82 C. C. A. 48

While a charge of conspiracy to defraud the United States under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], which wholly omits some essential element of the offense, cannot be aided by the statement of acts done to effect its object, this does not prevent reference to such statement for the purpose of ascertaining the sense in which terms are used in charging the conspiracy.
—Stearns v. United States, 152 Fed. 900.....82 C. C. A. 48

Where the facts alleged, in an indictment for conspiracy to commit an offense against the United States by subornation of perjury in proceedings to acquire public lands, necessarily import willfulness on the part of the persons giving such testimony, the failure of the indictment to use the word itself is not fatal.
—Van Gesner v. United States, 153 Fed. 46; Biggs v. Same, Id.; Williamson v. Same, Id.....82 C. C. A. 180

Under an indictment for conspiracy to commit an offense against the United States by subornation of perjury in procuring persons to make application for the purchase of lands under the timber and stone act, under agreements to convey the same to defendants, and to falsely swear, among other things, that such lands were chiefly valuable for timber, it was not error to permit the government to prove that the lands were not valuable for the timber upon them, but were chiefly valuable for grazing purposes, although such evidence tended to show that the lands were not subject to entry under the act.
—Van Gesner v. United States, 153 Fed. 46; Biggs v. Same, Id.; Williamson v. Same, Id.....82 C. C. A. 180

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See "Commerce," § 1; "Jury," § 1.
Amendment of statute, see "Statutes," § 3.
Enactment and validity of statutes, see "Statutes," § 1.
Subjects and titles of statutes, see "Statutes," § 2.

Digitized by Google

CONTRACTS.

Adoption by United States Court of practice of state courts in action on, see "Courts," § 2.
Agreements within statute of frauds, see "Frauds, Statute of."
Damages for breach, see "Damages," § 1.
Jurisdiction of United States Court of action for breach as dependent on amount in controversy, see "Courts," § 2.
Parol or extrinsic evidence, see "Evidence," § 2.
Specific performance, see "Specific Performance."
Weight and sufficiency of evidence in action on, see "Evidence," § 3.

Contracts of particular classes of persons.

See "Carriers," §§ 1, 2; "Master and Servant."

Contracts relating to particular subjects.

See "Mines and Minerals," § 1.
Protection of secret process as within rules against restraint of trade, see "Monopolies," § 2.
Transportation of goods, see "Carriers," § 2.

Particular classes of express contracts.

See "Bills and Notes"; "Covenants"; "Insurance"; "Sales."
Affreightment, see "Shipping," § 2.
Bills of lading, see "Carriers," § 2.
Composition with creditors of bankrupt, see "Bankruptcy," § 7.
Employment, see "Master and Servant."
Leases, see "Landlord and Tenant."
Sales of realty, see "Vendor and Purchaser."
Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Covenants," § 1.

Particular modes of discharging contracts.

See "Payment."

§ 1. Construction and operation.

The laws upon the subject of a contract are read into and become a part thereof to the same extent as though they were written into its terms.
—Armour & Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. 82 C. C. A. 135

To prevent an absurd or unreasonable result, the word "and," used in a contract, may be read "or," or vice versa.
—Manson v. Dayton, 153 Fed. 258; Jarmuth v. Same, Id..... 82 C. C. A. 588

§ 2. Performance or breach.

Under an agreement to furnish material for the construction of a building, to be paid for in monthly installments upon estimates made by the architect in charge of the work of the material on the ground delivered during the preceding month, of which 10 per cent. was to be retained until 30 days after all the material had been delivered and accepted and satisfactory proof made that there were no liens, the estimates to be made by the architect there provided for necessarily involved, not only an approximate judgment upon inspection by the architect or his representative of the quantity and value of the material delivered, having regard to its character as to which there may be a difference, but the relative value of it to the total quantity which had been contracted for.
—Fidelity & Deposit Co. v. Agnew, 152 Fed. 955....82 C. C. A. 103

Digitized by Google

CONTRIBUTORY FAULT.

Of vessel in collision, see "Collision," §§ 2, 4.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," §§ 1, 2.
Of employé on vessel, see "Shipping," § 1.
Of passenger, see "Carriers," § 3.
Of person injured by electric wire, see "Electricity."
Of servant, see "Master and Servant," § 1.

CONVEYANCES.

In trust, see "Trusts," § 1.

CORPORATIONS.

Bankruptcy of, see "Bankruptcy," §§ 2, 4.
Conclusiveness of judgment in action against holders of unpaid corporate stock, see "Judgment," § 1.
Consideration of notes of, see "Bills and Notes," § 1.
Pledge and sale of corporate stock distinguished, see "Sales," § 1.

Particular classes of corporations.

See "Municipal Corporations"; "Railroads"; "Street Railroads."

§ 1. Incorporation and organization.

Defendant employed plaintiff to assist him in building up a business, under a parol contract that plaintiff was to draw his necessary expenses, and that the balance of his compensation should be determined at a future time, when plaintiff had proved his worth in the business, and that plaintiff should consider that he was "in with" defendant in the business, and that it was half his own. After the business commenced to succeed, defendant formed a corporation, in order to better conduct the same, and became the owner of all the stock; plaintiff being elected president, treasurer, and one of the directors, which office he continued to hold until he resigned, in 1903. No action was ever taken by the corporation with reference to the payment of salaries, and no salary was ever fixed during plaintiff's employment. *Held*, that plaintiff's services, rendered after the organization of the corporation, were rendered under the original contract, and that the organization of the corporation did not relieve defendant from liability therefor.

—Bonsall v. Platt, 153 Fed. 126.....82 C. C. A. 260

§ 2. Members and stockholders.

Laws N. J. 1896, p. 284, c. 185, § 21, declares that where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts, each stockholder shall pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion thereof as is necessary to satisfy corporate debts. *Held*, that where a corporation directed the sale of certain of its stock of the par value of $100 per share at $25, and that the proceeds be used for regular expenses, the original purchasers of such stock were subject to assessment for the balance of

Digitized by Google

the par value thereof, or so much as was necessary for the payment of corporate debts.

—In re Remington Automobile & Motor Co., 153 Fed. 345..... 82 C. C. A. 421

The stock of a corporation to the amount of $8,000 was issued for property valued at the time for only $6,000. This stock was marked "full-paid" and certain of it was thereafter purchased in the open market by persons who, on request for information, were informed by the corporation's manager at its office that the stock was full paid. *Held*, that such stockholders, on the corporation becoming a bankrupt, were not liable to assessment to the amount of the difference between the value of the property and the par value of the stock.

—In re Remington Automobile & Motor Co., 153 Fed. 345..... 82 C. C. A. 421

Laws N. J. 1896, p. 293, c. 185, § 49, authorized corporations to issue full-paid stock for property, and declared that, in the absence of fraud, the judgment of the corporation's directors as to the value of the property should be conclusive. A corporation organized under such act contracted with a city's board of trade to remove its plant to such city in consideration of the board's purchase of shares of the company's stock at a price less than par, and to furnish the corporation a free site for its buildings. Certificates purporting to be full paid were issued to the board and sold to subscribers at the same price the board paid for it; the board also procuring a conveyance to the corporation of the site, which was accepted in fulfillment of the contract. *Held*, that such stock would be regarded as full-paid, and that neither the board nor purchasers from it were liable to further assessments for the benefit of creditors of the corporation after bankruptcy.

—In re Remington Automobile & Motor Co., 153 Fed. 345..... 82 C. C. A. 421

A bona fide purchaser of certain of such board of trade stock from the corporation, under the belief that the stock issued to him was issued pursuant to the board of trade agreement, but which in fact had been issued by the corporation to be sold for cash at less than par, was not bound to pay future installments on such stock.

—In re Remington Automobile & Motor Co., 153 Fed. 345..... 82 C. C. A. 421

CORRECTION.

Of irregularities and errors at trial, see "Criminal Law," § 4.
Of record on appeal or writ of error, see "Appeal and Error," § 4.

COSTS.

§ 1. Nature, grounds, and extent of right in general.

Where, in a suit for specific performance in a federal court, defendant raised the question of adequate remedy at law by answer, but did not call the court's attention thereto until final hearing on the merits, after large costs had been incurred in the taking of testimony, the court on sustaining such defense should have directed that a part of the costs should be taxed to defendants.

—Marthinson v. King, 150 Fed. 48.....82 C. C. A. 360

§ 2. On appeal or error, and on new trial or motion therefor.

Where appellees recover costs in the Circuit Court of Appeals, separate costs are taxed for the several appellees who appear separately and file separate briefs.

—Augusta Trust Co. v. Federal Trust Co., 153 Fed. 157..... 82 C. C. A. 309

Digitized by Google

Under amended rule 23 (150 Fed. xxxii, 79 C. C. A. xxxii) of the rules of the Circuit Court of Appeals for the Third Circuit, which provides that, in case of reversal, affirmance, or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given, the cost of such printing is so taxable, although it was done at the instance of the plaintiff in error and not of the clerk, as contemplated by the rule, where the record as so printed was accepted by the clerk, and no timely objection was made.
—Jayne v. Loder, 153 Fed. 739.....82 C. C. A. 625

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COURTS.

Jurisdiction of court of counterclaim in action of replevin, see "Set-Off and Counterclaim," § 1.
Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."
Right to trial by jury, see "Jury," § 1.
Trial by court without jury, see "Trial," § 5.

§ 1. Nature, extent, and exercise of jurisdiction in general.
While parties cannot confer jurisdiction on a federal court by consent, still where the jurisdictional facts are properly alleged, and thus properly appear on the record, and the parties proceed to trial on pleadings which go to the merits, and, particularly, when the jurisdictional facts are not subsequently put in issue by the defendant nor seriously denied, the case ordinarily will not be dismissed for want of jurisdiction, where the proofs do not create a legal certainty that it is not within the jurisdiction.
—William H. Perry Co. v. Klosters Aktie Bolag, 152 Fed. 957.....82 C. C. A. 321

§ 2. United States courts.
The decisions of the Supreme Court of a state, as to the common-law liability of a master for injuries caused by the negligence of fellow servants, are not binding on the federal courts.
—Kinnear Mfg. Co. v. Carlisle, 152 Fed. 933.....82 C. C. A. 81

Where certain township railroad aid bonds were issued under a state statute, and passed into the hands of non-resident holders for value at a time when the highest court of the state had rendered no decision intimating that a provision of the Constitution of the state would be subsequently so construed as to invalidate the bond act, the federal courts sitting within such state were not bound by such a decision holding that the bond act was illegally passed, the effect of which was to impair the obligation of the contract existing between the township and the bondholders.
—Board of Com'rs of Hertford County, N. C., v. Tome, 153 Fed. 81 82 C. C. A. 215

In a suit to enjoin the wrongful and unlawful interference with complainant's business, the amount in controversy, for the purpose of the jurisdiction of a federal court, is the value of the right sought to be protected, and a general averment in the bill that the value of the matter in dispute exceeds $25,000, together with further allegations, showing the extent of complainant's business which has been interfered with, and which will be interfered with in the future, unless protected by injunction, tending to show that the value of such right sought to be protected in the future largely exceeds $2,000, are sufficient, when not denied, to give the court jurisdiction.
—Evenson v. Spaulding, 150 Fed. 517.....82 C. C. A. 263

Digitized by Google

Rev. St. Mo. 1899, § 596 [Ann. St. 1906, p. 622], provides that the only plea on the part of the defendant is a demurrer or answer. Section 604 declares that the answer shall contain, first, a general or special denial; and second, a statement of any new matter constituting a defense or counterclaim. Section 605 authorizes a defendant to set forth, by answer, as many defenses and counterclaims as he may have. *Held*, that since the enactment of the conformity act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), it is not necessary for a defendant in a suit in a federal court sitting in Missouri to raise the question of jurisdiction by plea in abatement, but that an answer containing a general denial, etc., was effective to put in issue the allegations of diverse citizenship.

—Cole v. Carson, 153 Fed. 278.....82 C. C. A. 408

Where, in an action for breach of a contract for the sale of a drug business brought in a federal court, there was evidence that the business and good will was of such a value that plaintiff's share thereof, together with $500 advanced by plaintiff as a part of the price for which he also sued, would amount to $2,000, an objection that the amount in controversy was not shown to equal the jurisdictional amount because there was no proof of any market value of the goods inventoried or what they would sell for was unsustainable.

—Markell v. Matteson, 153 Fed. 564.....82 C. C. A. 518

In a suit in the federal court against a legatee on a contract for services rendered testator in his lifetime, whether plaintiff was a competent witness should be determined by the federal law, and not by the law of the state where the suit was brought, or the law of the state where the services were performed.

—Miller v. Steele, 153 Fed. 714.....82 C. C. A. 572

The action of the federal court in refusing a motion for a new trial is not reviewable on a writ of error.

—Miller v. Steele, 153 Fed. 714.....82 C. C. A. 572

On a trial of a cause in a Circuit Court without a jury, the court cannot be required to "hold" specific propositions of law presented by the parties.

—Southern Ry. Co. v. St. Louis Hay & Grain Co., 153 Fed. 728..... 82 C. C. A. 614

Parties to a suit at law in a federal court, tried to the court without a jury, have no right to require the court to make a special finding.

—Southern Ry. Co. v. St. Louis Hay & Grain Co., 153 Fed. 728.... 82 C. C. A. 614

Where the finding of a federal court in a law case tried without a jury is general, a writ of error reaches only the court's ruling in the progress of the trial, and, if the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment, as provided by Rev. St. § 700 [U. S. Comp. St. 1901, p. 570].

—Southern Ry. Co. v. St. Louis Hay & Grain Co., 153 Fed. 728.... 82 C. C. A. 614

COVENANTS.

§ 1. Requisites and validity.

A provision in a deed conveying right of way to a railroad company requiring the grantee to erect a station house thereon and to stop all passenger trains there which stopped at other stations within three miles *held*, in view of other provisions, to constitute a covenant and not a condition subsequent.

—Minard v. Delaware, L. & W. R. Co., 153 Fed. 578..82 C. C. A. 586

CREDIBILITY.

Of witness, see "Witnesses," § 3.

Digitized by Google

CREDITORS.

See "Bankruptcy."
Of testator, see "Wills," § 1.
Remedies against surety, see "Principal and Surety," § 3.
Right of creditors of city to be paid out of surplus, see "Municipal Corporations," § 1.

CRIMINAL LAW.

Indictment, information, or complaint, see "Indictment and Information."

Particular offenses.

See "Conspiracy," § 1; "Perjury."
Offenses against customs laws, see "Customs Duties," § 4.

§ 1. **Nature and elements of crime and defenses in general.**
The only criminal intent requisite to a conviction of an offense created by statute, which is not malum in se, is the purpose to do the act in violation of the statute. No moral turpitude or wicked intent is essential to a conviction of such a crime.
—Armour & Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. 82 C. C. A. 135

§ 2. **Venue.**
A continuing crime is a continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long it may occupy, and where such an act or series of acts runs through several jurisdictions the offense is committed and cognizable in each.
—Armour Packing Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. ..... 82 C. C. A. 135

Though complete in the jurisdiction where first committed, it may continue, be committed, and punished in another jurisdiction.
—Armour Packing Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id.; Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same, Id. ..... 82 C. C. A. 135

§ 3. **Evidence.**
Where defendants on trial were jointly indicted with others charged with carrying on the business of rectifiers in the names of certain companies organized by them with intent to defraud the United States of the internal revenue on their rectified spirits, a typewritten letter purporting to have been dictated by one of the defendants and signed in his name by a rubber stamp or stencil, no part of which was in his handwriting, was inadmissible as against him, in the absence of other evidence sufficient to connect him with the offense charged.
—Sprinkle v. United States, 150 Fed. 56 ..... 82 C. C. A. 1

A letter written wholly on a typewriter, with the signature of the accused thereto appended with a stencil, *held* incompetent as evidence against such accused as a communication purporting to have come from him, unless shown to have been acknowledged by him as his letter, or acquiesced in or acted upon by him.
—Sprinkle v. United States, 150 Fed. 56 ..... 82 C. C. A. 1

An indictment for conspiracy to commit an offense against the United States by subornation of perjury charged that defendants procured and instigated a number of persons to make application for the purchase of public lands in a certain township under the timber and stone act, and to falsely swear in their applications and proofs that they were not seeking to purchase such lands on speculation, but for their own exclusive benefit

Digitized by Google

and use, and that they had not made any contract or agreement by which the title would inure to the benefit of another; whereas, in truth and fact, such persons were applying to purchase the lands on speculation and under prior agreements to convey the title to defendants. *Held*, that under such indictment the motive of the parties to the transactions was a material fact to be proved, and that evidence that defendants had induced other persons to file on or purchase state lands in the same vicinity, which were subsequently conveyed to defendants, was properly admitted, where the jury were instructed to consider it only as bearing on such question of motive.

—Van Gesner v. United States, 153 Fed. 46; Biggs v. Same, Id.; Williamson v. Same, Id.....82 C. C. A. 180

Under such indictment, it was also competent for the government to show, by the persons who made such applications to purchase lands, that it was their intention and understanding at the time that the lands should be conveyed by them to defendants, contrary to their sworn statements and testimony.

—Van Gesner v. United States, 153 Fed. 46; Biggs v. Same, Id.; Williamson v. Same, Id.....82 C. C. A. 180

On the trial of a defendant charged, under Rev. St. § 5467 [U. S. Comp. St. 1901, p. 3691], as a post-office clerk with having secreted and embezzled letters containing articles of value, and stealing such articles from letters, the government produced witnesses who testified that they saw defendant open a letter and take therefrom an article of value, which he placed in a pigeonhole. Defendant in his own behalf testified that the letter referred to was open when received, and that the article which he placed in the pigeonhole he found lying loose on his table when assorting mail, and laid it away for proper disposition. *Held*, that he was entitled to show by other employés that the mails at the office had been very heavy for some time prior to this occurrence, and that many letters and packages came in bad condition, with the edges worn and broken, so that articles could readily fall out, as evidence tending to support his defense.

—Chitwood v. United States, 153 Fed. 551.....82 C. C. A. 505

On the trial of a post-office clerk charged with secreting and embezzling letters containing articles of value and stealing the contents, the government was entitled to prove a statement made by defendant a short time previously that he had destroyed a number of election circulars, a quantity of which had come into the office for distribution, as evidence tending to show the commission of an offense of similar character to those charged and bearing on the question of intent. Sanborn, Circuit Judge, dissenting.

—Chitwood v. United States, 153 Fed. 551.....82 C. C. A. 505

§ 4. Trial.

A verdict of acquittal in a criminal case will not be directed because of a defect in the indictment, unless it is one which would be fatal on motion in arrest of judgment.

—Stearns v. United States, 152 Fed. 900.....82 C. C. A. 48

An exception to the overruling of a motion for a directed verdict of acquittal at the close of the government's case on the ground of the insufficiency of the evidence is waived by the defendant by introducing evidence in his own behalf.

—Stearns v. United States, 152 Fed. 900.....82 C. C. A. 48

On the trial of a defendant charged, under Rev. St. § 5467 [U. S. Comp. St. 1901, p. 3691], as a post office clerk with having secreted and embezzled letters containing articles of value and stealing such articles from letters, the government produced witnesses who testified that they saw defendant open a letter and take therefrom an article of value, which he placed in a pigeonhole. Defendant in his own behalf testified that the letter referred to was open when received, and that the article which he placed in the pigeonhole he found lying loose on his table when assorting the mail, and laid it away for proper disposition. *Held*, that the weight of evidence

Digitized by Google

of other employés that the mails at the office had been very heavy for some time prior to this occurrence, and that many letters and packages came in bad condition, with the edges worn and broken, so that articles could readily fall out, was for the jury.
—Chitwood v. United States, 153 Fed. 551.....82 C. C. A. 505

§ 5. **Motions for new trial and in arrest.**
The objection that an indictment for conspiracy to defraud the United States of certain public lands does not make it altogether clear to what lands the conspiracy related cannot be taken by a motion in arrest of judgment.
—Stearns v. United States, 152 Fed. 900.....82 C. C. A. 48

§ 6. **Appeal and error, and certiorari.**
The erroneous admission of evidence against accused in a federal court will be presumed to have been prejudicial unless it is made to appear beyond a doubt that it was harmless.
—Sprinkle v. United States, 150 Fed. 56.....82 C. C. A. 1

The six months granted by Act Cong. March 3, 1891, c. 517, § 11, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552], within which a writ of error may be taken in a criminal case, cannot be extended.
—Old Nick Williams Co. v. United States, 152 Fed. 925.....
82 C. C. A. 73

The time within which accused may sue out a writ of error begins to run from the date judgment was entered.
—Old Nick Williams Co. v. United States, 152 Fed. 925.....
82 C. C. A. 73

Where delay in suing out a writ of error was the act of accused, it could not be cured by a nunc pro tunc order.
—Old Nick Williams Co. v. United States, 152 Fed. 925.....
82 C. C. A. 73

Where a writ of error sued out by accused is filed in time, the time for complying with it may be enlarged by proper orders.
—Old Nick Williams Co. v. United States, 152 Fed. 925.....
82 C. C. A. 73

A writ of error sued out by accused does not become effective until deposited with the clerk of the trial court.
—Old Nick Williams Co. v. United States, 152 Fed. 925.....
82 C. C. A. 73

Rev. St. § 997 [U. S. Comp. St. 1901, p. 712], providing that an assignment of errors shall be annexed to and returned with a writ of error, does not necessitate the settlement of a bill of exceptions prior to the filing of the writ and the assignment of errors.
—Old Nick Williams Co. v. United States, 152 Fed. 925.....
82 C. C. A. 73

In a criminal case in a federal court which involves a constitutional question, after a judgment of conviction, the defendant is put to his election whether he will take the case direct to the Supreme Court of the United States on such question, or take the whole case to the Circuit Court of Appeals, and, where he elects the former, a writ of error subsequently taken out to the Circuit Court of Appeals will be dismissed.
—Van Gesner v. United States, 153 Fed. 46; Biggs v. Same, Id.; Williamson v. Same, Id.....82 C. C. A. 180

§ 7. **Punishment and prevention of crime.**
Where a defendant has been convicted on different counts of an indictment charging separate offenses under the same statute, the court may impose separate and cumulative sentences upon the several counts, but a single sentence for a term longer than is authorized by the statute for one

Digitized by Google

offense is void to the extent of the excess, and another court cannot cure the defect by apportioning the term upon the different counts.

—United States v. Peeke, 153 Fed. 166.....82 C. C. A. 340

CROSS-EXAMINATION.

See "Witnesses," §§ 2, 3.

CUMULATIVE SENTENCE.

See "Criminal Law," § 7.

CUSTOMS DUTIES.

§ 1. Validity, construction, and operation of customs laws in general.

The rule applied that a uniform construction given to a provision of a tariff schedule by the Treasury Department through a number of years, during which importations are made in reliance thereon, will not be overruled by the courts, except for cogent reasons.

—Burditt & Williams Co. v. United States, 153 Fed. 67.....
82 C. C. A. 201

The schedules of the tariff acts of 1890 and 1897 are based on the principle of protection to American industry, and in the construction of their provisions no inference can be drawn against a particular construction, because it will result in imposing double or treble duties on an article by adding duties for each stage it is advanced in manufacture.

—Burditt & Williams Co. v. United States, 153 Fed. 67.....
82 C. C. A. 201

Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639], imposes a duty on steel wire smaller than No. 16 wire gauge of 2 cents per pound, with an additional duty of 1¼ cents per pound on articles manufactured from such wire, "and on iron or steel wire coated with zinc, tin, or any other metal two-tenths of 1 cent per pound in addition to the duty imposed on the wire from which it is made." In 1900 the Treasury Department ruled that articles manufactured from steel wire coated were subject to all three of such duties, but shortly thereafter, and in the same year, formally reversed such ruling, and has since uniformly ruled that the additional duty of two-tenths of 1 cent was not to be imposed on articles manufactured from coated steel wire. *Held*, that in view of the uncertainty of the language of the statute such uniform ruling by the executive department, continued for five years, would be treated as a practical construction of the act, and would not be reversed by the courts.

—Burditt & Williams Co. v. United States, 153 Fed. 67.....
82 C. C. A. 201

§ 2. Goods subject to duty, rate, and amount.

Mushrooms dried in order to preserve them and placed in hermetically sealed tins holding from 30 to 45 pounds, are within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649], relating to "mushrooms prepared or preserved, in tins, jars, bottles or similar packages," rather than paragraph 257, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], relating to "vegetables in their natural state."

—Choy Chong Woh & Co. v. United States, 153 Fed. 879.....
82 C. C. A. 608

The slicing of vegetables solely to facilitate the natural drying operation is not sufficient to remove them from their natural state; and mushrooms cleaned, sliced, and dried in the sun are dutiable as "vegetables

Digitized by Google

in their natural state," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 257, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], rather than as "vegetables prepared or preserved," under paragraph 241, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649].
—A. Zanmati & Co. v. United States, 153 Fed. 880....82 C. C. A. 626

The addition of from 2.28 to 8.82 per cent. of sugar to pineapples preserved in cans in their own juice does not remove the fruit from the provision for "pineapples preserved in their own juice," in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], to the provision in the same paragraph for "fruits preserved in sugar."
—U. H. Dudley & Co. v. United States, 153 Fed. 881...82 C. C. A. 627

Niger-seed oil, which, while used in soap making, can be used for other purposes, though without the proper qualities for such purposes, is within the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 568, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1684], for oils "commonly used in soap making, * * * fit only for such use."
—United States v. Colby & Co., 153 Fed. 883.....82 C. C. A. 629

§ 3. Entry and appraisal of goods, bonds, and warehouses.
In ascertaining the dutiable weight of shelled nuts dutiable by the pound, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, pars. 269, 270, 30 Stat. 172 [U. S. Comp. St. 1901, pp. 1651, 1652], no allowance should be made for impurities in importations not shown to contain abnormal quantities of foreign matter, nor to vary from the ordinary wholesale condition.
—Spencer & Co. v. United States, 151 Fed. 1022.....82 C. C. A. 656

§ 4. Violations of customs laws.
Jurisdiction of a proceeding for the forfeiture of smuggled goods exists only in the district of seizure, which is the district in which the goods, if on land, are found; a collector cannot, by carrying them into another district and there making the formal seizure, confer jurisdiction of the proceeding on the court in such district.
—United States v. Larkin, 153 Fed. 113.....82 C. C. A. 247

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 1.

§ 1. Measure of damages.
A contract to furnish the materials and labor for certain work on a structure provided that in case the contractor should fail to complete the contract in accordance with its terms the second party should have the right to recover any and all damages incurred by reason of said failure, and also to recover whatever sums might be expended in completing the said contract in excess of the contract price. *Held*, that upon such failure and the completion of the contract by the second party his recovery was not limited to the reasonable cost of such completion, to be determined by a jury, but that he was entitled to recover the actual amount expended by him in good faith in such completion.
—Baer v. Sleicher, 153 Fed. 129.....82 C. C. A. 281

DEATH.

Caused by operation of railroad, see "Railroads," § 3.
Examination of witnesses in action for, see "Witnesses," § 2.
Liability for death of servant, see "Master and Servant," § 1.
Review of discretionary rulings in action for, see "Appeal and Error," § 6.

Digitized by Google

§ 1. **Actions for causing death.**

The legal presumption of the dependence of the wife and minor children upon the husband and father during his lifetime for support is rebuttable, not conclusive, and evidence by a plaintiff in support of it before she knows whether or not the defendant will present evidence to overcome it is neither incompetent nor immaterial.

—Standard Oil Co. v. Parkinson, 152 Fed. 681.....82 C. C. A. 29

In Nebraska the legal presumption is, in an action under sections 2503, 2504, Comp. St. Neb. 1901, for damages for the death of a person by the wrongful act of another, that the widow and children of the deceased person were dependent upon him for support and maintenance, and that they sustained pecuniary injuries by his death.

—Standard Oil Co. v. Parkinson, 152 Fed. 681.....82 C. C. A. 29

DEBTOR AND CREDITOR.

See "Bankruptcy."

DECEDENTS.

Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

DECLARATIONS.

As evidence in criminal prosecutions, see "Criminal Law," § 3.

DEEDS.

Covenants in deeds, see "Covenants."
In trust, see "Trusts," § 1

DELAY.

In suing out writ of error in criminal prosecution, see "Criminal Law," § 6.

DELIVERY.

Of goods sold, see "Sales," § 3.

DENIALS.

In pleading, see "Pleading," § 1.

DEPOSITIONS.

See "Witnesses."
In equity, see "Equity," § 3.

DESCENT AND DISTRIBUTION.

See "Wills."

DESCRIPTION.

Of property conveyed, see "Boundaries," § 1.

Digitized by Google

DEVISES.

See "Wills."

DIRECTING VERDICT.

In civil actions, see "Trial," §§ 2, 6.
In criminal prosecutions, see "Criminal Law," § 4.

DISCHARGE.

From indebtedness, obligation, or liability.

See "Bankruptcy," § 8.
By payment by third party, see "Payment," § 1.
Liability as surety, see "Principal and Surety," § 2.

DISCRETION OF COURT.

As to directing verdict in civil actions, see "Trial," § 2.
As to examination of witnesses, see "Witnesses," § 3.
As to finding in civil action, see "Trial," § 5.
As to specific performance, see "Specific Performance," § 1.
Review in civil actions, see "Appeal and Error," § 6.

DISMISSAL AND NONSUIT.

Dismissal of action for infringement of patent, see "Patents," § 3.

DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 6.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States Court, see "Removal of Causes," § 1.

DOCKS.

See "Wharves."

DOCUMENTS.

As evidence in criminal prosecutions, see "Criminal Law," § 3.

DOMICILE.

As affecting jurisdiction of court on removal of cause, see "Removal of Causes," § 1.

DUTIES.

Excise duties, see "Internal Revenue."

Digitized by Google

ELECTRICITY.

Plaintiff's intestate, who was a lineman in the employ of a telegraph company, while stringing wire on a pole, received a severe electric shock which caused him to fall, resulting in his death. The pole also carried telephone wires, one of which was grounded, and two high current electric wires of defendant. These wires were placed next the pole on each side, about 18 inches apart, and one was spliced near the pole, and at such splice the insulating tape had worn or burned away, leaving the wire exposed, but the absence of insulation was not noticeable without close inspection. The deceased was an experienced lineman, and was familiar with the pole and the wires thereon. No one saw the accident, but there was evidence tending to show that the shoulder of deceased came in contact with the exposed part of the electric light wire while his foot was touching the grounded telephone wire which was some five feet below. *Held* that, in view of the fact that defendant was required to insulate its wires and attempted to do so, the question of its negligence in placing the wires so near together, and in failing to properly inspect the same so as to keep the insulation in a reasonably safe condition, where it was known that linemen were liable to come in contact with them, was for the jury, as also the question of the contributory negligence of the deceased; there being no evidence that he knew the wire was not properly insulated, and did not rely on its being so insulated, as he had reasonable grounds to do.

—Memphis Consol. Gas & Electric Co. v. Bell, 152 Fed. 677..... 82 C. C. A. 25

Plaintiff, who was a telephone lineman, was directed to climb a pole to assist in stringing a wire thereon. Defendant electric company maintained a highly charged electric light wire which passed within four inches of the pole, and on the side nearest the pole the insulation had been worn or burned off. There was already one man on the pole above such wire, and plaintiff testified that he looked at the wire from the ground and the insulation appeared to be all right. He went up on the opposite side, and at the time he reached the wire the pole was swayed, apparently by some action of the man above, and his hands came in contact with the exposed wire, resulting in his injury. *Held*, that such evidence did not warrant an inference of negligence on his part as matter of law, but such question was properly one for the jury.

—Gloucester Electric Co. v. Dover, 153 Fed. 139....82 C. C. A. 291

In an action by a telephone lineman against an electric light company to recover for a personal injury received by plaintiff from contact with an uninsulated part of a wire strung in close proximity to a telephone pole on which plaintiff was working, the question at issue is not one of assumption of risk, but of due care and reasonable inspection on the part of defendant in relation to its wire, and of due care on the part of plaintiff in the manner of doing his work in view of the known danger.

—Gloucester Electric Co. v. Dover, 153 Fed. 139....82 C. C. A. 291

EMINENT DOMAIN.

§ 1. Compensation.

Where the United States in its sovereign capacity exercises its arbitrary power to condemn private property for necessary public use, the just compensation which it is required by the Constitution to make to the owner should be determined on equitable principles, and should be such as to put the owner in as good condition pecuniarily as he would have been if the property had not been taken.

—United States v. Town of Nahant, 153 Fed. 520; In re United States, Id.; Ex parte Town of Nahant, Id.....82 C. C. A. 470

Digitized by Google

In determining the just compensation to which a town was entitled on the taking of a part of its water and sewer systems by the United States, in proceedings to condemn land for government purposes, where the parts taken were essential to enable the systems to perform their functions, it was not error to permit the town to show the fair cost of restoring the water and sewer systems to their original efficiency of circulation, or to make such cost the measure of compensation.
—United States v. Town of Nahant, 153 Fed. 520; In re United States, Id.; Ex parte Town of Nahant, Id.....82 C. C. A. 470

An award of compensation to a town under such circumstances should not include interest from the time of the institution of the proceedings where up to the time of the trial there has been no actual taking and the use by the town of its complete water and sewer systems has not been interfered with, but the award is based on the estimated cost in the future of completing the systems in view of their contemplated impairment.
—United States v. Town of Nahant, 153 Fed. 520; In re United States, Id.; Ex parte Town of Nahant, Id.....82 C. C. A. 470

Where a town having statutory power to condemn land or right of way for sewer purposes actually acquired and took possession of land for such purpose, and constructed at large expense and had maintained for a number of years a sewer over the same without objection from the landowner, it has such an interest in the land and structure as entitles it to be justly compensated therefor when the same are taken by the United States for a paramount public use, without regard to the strict regularity of the proceedings by which it acquired the right. Such right of compensation also extends to structures placed by the town in public streets or roads, such as water or sewer pipes where such streets are taken, but not to the easements in the streets themselves, nor to material thinly spread upon the ground for road purposes of such character that it loses its identity and tangibility as property when so used.
—United States v. Town of Nahant, 153 Fed. 520; In re United States, Id.; Ex parte Town of Nahant, Id.....82 C. C. A. 470

EMPLOYÉS.

See "Master and Servant."

ENTRY.

Of imported goods, see "Customs Duties," § 3.

EQUITY.

Privilege of witness on examination before master, see "Witnesses," § 2.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Injunction"; "Specific Performance"; "Trusts."
Action against legatee, see "Wills," § 1.
Cancellation of mining contract, see "Mines and Minerals," § 1.
Suits for infringement of patents, see "Patents," § 3.
Unfair competition, see "Trade-Marks and Trade-Names," § 1.

§ 1. Jurisdiction, principles, and maxims.

The defense of adequate remedy at law is one of substance in the national courts affecting the jurisdiction, and may, therefore, be raised at any stage of the proceedings, either by the parties, or the court of its own volition.
—Marthinson v. King, 150 Fed. 48.....82 C. C. A. 360

Digitized by Google

§ 2. **Pleading.**

Amendments to a bill, on the hearing of a motion for a preliminary injunction, and before demurrer or answer, *held* properly allowed under equity rule 28, either as relating to matters of form, or as within the discretion of the court.

—Evenson v. Spaulding, 150 Fed. 517.....82 C. C. A. 263

Equity jurisdiction cannot be invoked by mere charges of fraud, conspiracy, prayers for injunction, and the cancellation of deeds as a cloud on title.

—Marthinson v. King, 150 Fed. 48.....82 C. C. A. 360

§ 3. **Taking and filing proofs.**

Judiciary Act Sept. 24, 1789, c. 20, § 30, 1 Stat. 88, authorizing federal courts to require a party to adduce his evidence orally in open court on final hearing was repealed by Rev. St. § 862 [U. S. Comp. St. 1901, p. 661], declaring that the mode of proof in equity causes shall be according to rules now or hereafter prescribed by the Supreme Court, except as otherwise specially provided.

—Hyams v. Federal Coal & Coke Co., 152 Fed. 970....82 C. C. A. 324

Amendment May 15, 1893, to Equity Rule 67 [149 U. S. 793, 13 Sup. Ct. iii], providing that on due notice given as prescribed by previous order, the court may, in its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing does not authorize the court to require an unwilling party to so adduce evidence and forego his right to use the methods prescribed by the rule prior to amendment.

—Hyams v. Federal Coal & Coke Co., 152 Fed. 970....82 C. C. A. 324

§ 4. **Masters and commissioners, and proceedings before them.**

Where a witness refused to answer a question propounded on a hearing before a master, and the question was certified to the court, but the proponent failed to press the motion to compel the witness to answer, he waived his right to an answer.

—Dr. Peter H. Fahrney & Sons Co. v. Ruminer, 153 Fed. 735.... 82 C. C. A. 621

ERROR, WRIT OF.

See "Appeal and Error."

ESTABLISHMENT.

Of railroads, see "Street Railroads," § 1.

ESTATES.

Estates for years, see "Landlord and Tenant."

ESTOPPEL.

By judgment, see "Judgment," § 1.

EVIDENCE.

See "Witnesses."
Admissibility of evidence under pleading, see "Pleading," § 2.
Applicability of instructions to evidence, see "Trial," § 3.
Reception at trial, see "Trial," § 1.

Digitized by Google

As to particular facts or issues.

Contract for sale of realty, see "Vendor and Purchaser," § 1.
Good faith of purchaser of school district bonds, see "Schools and School Districts," § 1.

In actions by or against particular classes of persons.

See "Principal and Agent," § 1; "Principal and Surety," § 3.
Trustee in bankruptcy, see "Bankruptcy," § 5.

In particular civil actions or proceedings.

For causing death, see "Death," § 1.
For injury to tow, see "Towage."
For loss of cargo of vessel, see "Shipping," § 2.
For personal injuries, see "Master and Servant," § 1; "Shipping," § 1.

In criminal prosecutions.

See "Conspiracy," § 1; "Criminal Law," § 3.

Review and procedure thereon in appellate courts.

Harmless error in rulings on, see "Appeal and Error," § 6.
Review of evidence in general, see "Appeal and Error," § 6.

§ 1. Relevancy, materiality, and competency in general.
Where the whole or part of a conversation is put in evidence by one party, the other is entitled to explain, vary, or contradict it.
—Stanley v. Beckham, 153 Fed. 152.....82 C. C. A. 304

In an action for injuries, statements of witnesses as to plaintiff's expressions of pain were competent.
—Armour & Co. v. Skene, 153 Fed. 241.....82 C. C. A. 385

§ 2. Parol or extrinsic evidence affecting writings.
In the adjustment of private reciprocal rights, where the parties have deliberately put into writing their mutual convention, such expression of their intention and understanding is final and conclusive, and cannot be varied or controlled by any antecedent negotiations or declarations in pais.
—Manson v. Dayton, 153 Fed. 258; Jarmuth v. Same, Id.....
82 C. C. A. 588

§ 3. Weight and sufficiency.
In a suit against a legatee on a contract for services between plaintiff and testator, it was not error for the court to refuse to charge that the proof of plaintiff's claim must be clear and unequivocal in order to entitle her to recover; a preponderance of the evidence being sufficient.
—Miller v. Steele, 153 Fed. 714.....82 C. C. A. 572

EXAMINATION.

Of witnesses in general, see "Witnesses," § 2.

EXCEPTIONS.

Waiver of, at trial in civil actions, see "Trial," § 6.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," § 4; "Criminal Law," § 6.

Digitized by Google

§ 1. **Settlement, signing, and filing.**

A bill of exceptions cannot be considered by an appellate court unless it was duly presented to and allowed by the trial judge during the term at which the trial was had or within the time as extended by an order made during such term, or where there is a rule of court on the subject during the time so fixed, or an extension granted before its expiration.

—Oxford & Coast Line R. Co. v. Union Bank of Richmond, Va., 153 Fed. 723.....82 C. C. A. 609

Under Rev. St. § 953 [U. S. Comp. St. 1901, p. 696], which provides that a bill of exceptions shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto, no bill of exceptions is sufficiently authenticated unless signed by a judge who sat at the trial within the time required by law, and the omission or failure to sign the same cannot be cured by a certificate of the judge that it was allowed, settled, and signed within such time.

—Oxford & Coast Line R. Co. v. Union Bank of Richmond, Va., 153 Fed. 723.....82 C. C. A. 609

EXCISE.

Duties, see "Internal Revenue."

EXECUTORS AND ADMINISTRATORS.

See "Wills."
Testimony as to transactions with decedents, see "Witnesses," § 1.

EXEMPTIONS.

From liability of vessel owner, see "Shipping," § 2.
To wife of bankrupt, see "Bankruptcy," §§ 8, 9.

FALSE SWEARING.

See "Perjury."

FAULT.

Of vessel in collision, see "Collision," §§ 2–5.

FEDERAL COURTS.

See "Courts," § 2.

FELLOW SERVANTS.

See "Master and Servant," § 1.

FILING.

Bill of exceptions, see "Exceptions, Bill of," § 1.

Digitized by Google

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 1.

FINDINGS.

Special findings by judge, see "Trial," § 5.

FIRE INSURANCE.

See "Insurance," § 2.

FIRES.

Caused by operation of railroad, see "Railroads," § 8.

FORFEITURES.

Of smuggled goods, see "Customs Duties," § 4.

FORMER ADJUDICATION.

See "Judgment," § 1.

FRAUD.

Conspiracy to defraud, see "Conspiracy," § 1.

By particular classes of persons, or persons in particular relations.

Agents, see "Principal and Agent," § 1.

In particular classes of conveyances, contracts, transactions, or proceedings.

See "Sales," § 1.

Contract for sale of realty, see "Vendor and Purchaser," § 2.

Entry of public lands, see "Public Lands," § 1.

FRAUDS, STATUTE OF.

§ 1. Operation and effect of statute.

Equity will not permit the statute of frauds to be invoked in favor of a party who has not performed his oral undertaking against one who, at his invitation and in reliance on his promise, has expended money and changed his situation.

—Atchison, T. & S. F. Ry. Co. v. Hurley, 153 Fed. 503..... 82 C. C. A. 453

Where a contract for the purchase of an interest in certain mining claims was wholly performed by the vendor, and almost completely performed by the purchaser, prior to the latter's repudiation thereof, such performance was effective to take it out of the statute of frauds.

—Ferguson v. Blood, 152 Fed. 98.....82 C. C. A. 482

Where defendant led plaintiff to believe that he had signed a written contract for an interest in certain mining claims, and induced plaintiff to purchase claims on which he had options, and to otherwise expend money and time to carry out the provisions of the agreement, defendant could

Digitized by Google

not assert that the contract was void under the Idaho statute of frauds because he did not in fact sign the same, under Rev. St. Idaho 1887, § 3225, declaring that, where a contract which is required by law to be in writing is prevented from being put in writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts on such belief to his prejudice, may enforce it against the fraudulent party.
—Ferguson v. Blood, 152 Fed. 98.....82 C. C. A. 482

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," §§ 1, 3.

GOOD FAITH.

Of purchaser of school district bonds, see "Schools and School Districts," § 1.

GRAND JURY.

See "Indictment and Information."

GRANTS.

Of monopolies, see "Monopolies," § 1.
Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."

GUARANTY INSURANCE.

See "Insurance," § 1.

HABEAS CORPUS.

§ 1. Nature and grounds of remedy.
Where a defendant has been convicted on different counts of an indictment charging separate offenses under the same statute, and the court has imposed a single sentence for a term longer than is authorized by the statute for one offense, another court cannot cure the defect by apportioning the term upon the different counts; but, after serving the lawful part of the term, the prisoner may be discharged on a writ of habeas corpus. Order, Ex parte Peeke (D. C. 1906) 144 F. 1016, affirmed.
—United States v. Peeke, 153 Fed. 166.....82 C. C. A. 340

The parents of a minor son under the age of 18 years, who has enlisted in the navy without their knowledge or consent, in violation of Rev. St. § 1419 [U. S. Comp. St. 1901, p. 1007], are entitled to his discharge on habeas corpus, and their right cannot be denied because of contemplated or possible court-martial proceedings against the minor for fraudulent enlistment, especially where, between the time demand for his discharge was made by the parents and the procuring of the writ, several months elapsed, during which no proceedings were taken against him.
—Dillingham v. Bakley, 152 Fed. 1022.....82 C. C. A. 659

Digitized by Google

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 6.

HARTER ACT.

See "Shipping," § 2.

HOMESTEAD.

As property exempt to bankrupt, see "Bankruptcy," § 8.
Conspiracy to defraud United States by fraudulent homestead entries, see "Conspiracy," § 1.
Entry of public lands, see "Public Lands," § 1.

HUSBAND AND WIFE.

Exemptions to wife of bankrupt, see "Bankruptcy," §§ 8, 9.

IMPEACHMENT.

Of witness, see "Witnesses," § 3.

IMPLIED CONTRACTS.

See "Covenants," § 1.

IMPRISONMENT.

Habeas corpus, see "Habeas Corpus," § 1.

INCORPORATION.

See "Corporations," § 1.

INDEBTEDNESS.

Of testator, see "Wills," § 1.

INDEMNITY.

See "Principal and Surety."

INDEMNITY INSURANCE.

See "Insurance," § 1.

INDEPENDENT CONTRACTORS.

Liability for injuries to servant of, see "Master and Servant," § 2.

Digitized by Google

INDICTMENT AND INFORMATION.

For conspiracy, see "Conspiracy," § 1.
For discriminations by carrier, see "Carriers," § 1.

§ 1. Requisites and sufficiency of accusation.

An indictment must set forth facts which the pleader claims constitute the transgression, and every essential element of it, with such clearness and certainty as (1) to advise the accused of the charge he has to meet, and to give him a fair opportunity to prepare his defense, (2) to enable him to avail himself of the judgment thereon in defense of another prosecution for the same offense, and (3) to qualify the court to determine whether or not the facts there stated are sufficient to support a conviction.

—Armour & Co. v. United States, 153 Fed. 1; Swift & Co. v. Same, Id., Morris & Co. v. Same, Id.; Cudahy Packing Co. v. Same. Id..... 82 C. C. A. 135

INFORMATION.

Criminal accusation, see "Indictment and Information."

INFRINGEMENT.

Of patent, see "Patents," § 3.
Of trade-mark, see "Trade-Marks and Trade-Names," § 1.

INJUNCTION.

Amendment of pleading, see "Equity," § 2.
Jurisdiction of United States court as dependent on amount in controversy, see "Courts," § 2.

Relief against particular acts or proceedings.

Infringement of patent, see "Patents," § 3.
Interference with agreements to prevent competition, see "Monopolies," § 2.
Unfair use of trade-name, see "Trade-Marks and Trade-Names," § 1.

Review of proceedings for injunction.

Review as dependent on finality of determination, see "Appeal and Error," § 1.
Review of discretionary rulings, see "Appeal and Error," § 6.

§ 1. Subjects of protection and relief.

Defendant, which was a voluntary association composed of numerous members doing business throughout eastern Washington, organized a subsidiary association known as the "Peddlers' Association" and contributed funds thereto for the purpose of "competing with the peddlers," especially those selling buggies and wagons. The association itself had no property except the fund so contributed, and the majority of its members had no buggies or wagons for sale. Complainant was a manufacturer of wagons and buggies in another state, some of which were shipped to Washington, and there sold by agents, who took a number of vehicles and drove through the country selling chiefly to farmers, and had thus built up a profitable business. Defendant, through its said subsidiary organization, entered upon a systematic course of interference with the business of complainant by employing men, usually two, to follow each agent of complainant. They stopped at the same hotels and stables, started out when he started, and followed him throughout the day to every prospective customer, and interfered with the conversation. They took no vehicles with

Digitized by Google

them, and generally offered none in competition; their sole purpose appearing to be to interfere with and prevent sales by complainant's agents by means of interruptions and false statements respecting complainant and its goods and intimidating and discouraging its agents. *Held*, that such action was unwarranted upon any ground or claim of competition, and was an unlawful attempt to wantonly destroy complainant's business, and was properly enjoined.
—Evenson v. Spaulding, 150 Fed. 517.....82 C. C. A. 263

When a party asserts the ownership of property, or a specific lien thereon, it is within the discretion of the trial court to retain the property within its jurisdiction until the questions at issue can be determined, even though such property is a fund in the hands of the receiver of a national bank and an injunction is necessary to restrain him from transmitting it to the Comptroller of the Currency in the usual course as required by statute.
—American Can Co. v. Williams, 153 Fed. 882.....82 C. C. A. 628

§ 2. Actions for injunctions.
In a suit in equity in a federal court to enjoin the defendant from proceeding under an oil and gas lease which obligated him to operate for oil and gas for a term of years, and to pay royalties in kind and in cash to the owner of the land, the right of complainant to relief being based on the alleged invalidity of such lease, the landowner is an indispensable party, without whose presence the court can make no decree.
—McConnell v. Dennis, 153 Fed. 547.....82 C. C. A. 501

§ 3. Preliminary and interlocutory injunctions.
While a preliminary injunction is to be cautiously used by a court of equity, it should not be withheld if, in the exercise of a sound judgment, it is deemed necessary to prevent injustice.
—Continuous Glass Press Co. v. Schmertz Wire Glass Co., 153 Fed. 577
82 C. C. A. 587

It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case, and, unless the court is convinced with reasonable certainty that the complainant must succeed at final hearing, the writ should be denied.
—Hall Signal Co. v. General Ry. Signal Co., 153 Fed. 907..... ..
82 C. C. A. 653.

INSOLVENCY.

See "Bankruptcy."
Of street railroad company, see "Street Railroads," § 1.

INSPECTION.

Of goods sold, see "Sales," § 4.
Of vessel, as constituting due diligence, see "Shipping," § 2.

INSTRUCTIONS.

In civil actions, see "Trial," § 3.

INSURANCE.

§ 1. Extent of loss and liability of insurer.
A policy, issued by a casualty company, insured against loss from liability for damages on account of bodily injuries accidentally suffered by any person caused by the negligence of the assured, "and against the expense

Digitized by Google

of defending any suit for such damages." It limited the company's liability arising from the injury or death of one person to $5,000, and provided for notice to the company of any injury and any claim or suit for damages therefor, that the company should defend or settle any such suit, and prohibited the assured from making any settlement or incurring any expense or interfering in any negotiations for settlement or in any legal proceeding without the company's consent. *Held*, that the limitation did not include the costs and expenses of a suit on a claim for damages for the death of a person which was defended by the company pursuant to the terms of the policy, and that on recovery of a larger sum by the plaintiff therein the assured was entitled under the policy to be reimbursed for the costs and expenses which it was compelled to pay in addition to the $5,000 indemnity against the damages recovered.

—New Amsterdam Casualty Co. v. Cumberland Telephone & Telegraph Co., 152 Fed. 961.....82 C. C. A. 315

§ 2. Adjustment of loss.

Plaintiff owned three buildings, two of which she insured in defendant company against loss by fire, and also procured from defendant a policy insuring the rents of all the buildings. The buildings having been totally destroyed by fire, arbitrators were appointed, and awarded plaintiff three months' rent on all the buildings, and $3,835.56 on the two buildings insured. No date was set in the award from which the three months was to run, nor did the award specify the monthly rent which was to be allowed, whereupon defendant construed the award to entitle plaintiff to three months' rent from the date of the award, and paid into court what it claimed to amount to the rent for five months, together with the additional loss on the buildings. *Held*, that such award was fatally defective for uncertainty as to the amount allowed for the rent, and, this being inseparable from the balance, the whole award was void.

—Palatine Ins. Co., Limited, of Manchester, Eng., v. O'Brien. 152 Fed. 922.....82 C. C. A. 70

INTENT.

As to payment by third party, see "Payment," § 1.
Criminal, see "Criminal Law," § 1.

INTEREST.

Amending verdict in civil action to add, see "Trial," § 4.
As element of compensation for property taken in exercise of power of eminent domain, see "Eminent Domain," § 1.

INTERIOR DEPARTMENT.

See "Public Lands," § 2.

INTERLOCUTORY INJUNCTION.

See "Injunction," § 3.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 1.

Digitized by Google

INTERNAL REVENUE.

The oleomargarine acts (Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], as amended by Act May 9, 1902, c. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1905, p. 432]) are complete in themselves, only those provisions of the general internal revenue statutes which are expressly enumerated therein being applicable thereto; and a collector is not authorized to exact the penalty of 50 per cent. provided for by Rev. St. § 3176 [U. S. Comp. St. 1901, p. 2068], from a dealer for neglecting to make the proper return.
—Craft v. Schafer, 153 Fed. 175.....82 C. C. A. 349

A sale of property by an internal revenue officer under a distraint warrant for the collection of a tax does not cut off the title of a third person who does not owe the tax and against whose property the warrant is not directed, and the true owner may assert his title and right of possession by replevin against the purchaser after the officer has made the sale and transferred possession, and has thus completed his official acts with respect to the property. A sale of property by a collector under a distraint warrant is clearly distinguishable from a sale of property seized and condemned in forfeiture proceedings for violation of the customs or internal revenue laws, and passes only the interest of the tax debtor.
—Sheridan v. Allen, 153 Fed. 568.....82 C. C. A. 522

INTERSTATE COMMERCE.

Regulation, see "Carriers," § 1; "Commerce."

INVENTION.

See "Patents."

ISSUES.

In civil actions, see "Pleading," § 2.

JOINT-STOCK COMPANIES.

See "Associations."

JOURNALS.

Entry on legislative journal as to passage of statute, see "Statutes," § 1.

JUDGES.

See "Courts."
Signature of judge to bill of exceptions, see "Exceptions, Bill of," § 1.

JUDGMENT.

In action to foreclose vendor's lien on land sold, see "Vendor and Purchaser," § 3.
On appeal or writ of error in civil actions, see "Appeal and Error," § 7.
Review, see "Appeal and Error."

Digitized by Google

§ 1. Conclusiveness of adjudication.

Where judgments on certain township railroad aid bonds had become dormant by the lapse of three years, without process to enforce the same, and therefore required an order of court entered on notice to revive the judgments and authorize enforcement by mandamus, as provided by Revisal, N. C. 1905, § 620, the defendants on such an application were not estopped by the judgments to question the validity of the act under which the bonds were issued.

—Board of Com'rs of Hertford County, N. C., v. Tome, 153 Fed. 81 82 C. C. A. 215

A testator directed that a fund should be held in trust, the income to be paid to a granddaughter during her life, and appointed his son and grandson "executors and trustees" under the will. They qualified as executors, but not as trustees, and took possession of the trust property. They were also partners in business, and as such borrowed from themselves as executors or trustees a portion of the trust property. To secure the loan they attempted to transfer certain property to themselves as trustees, but on their subsequent adjudication as bankrupts such property was taken into possession by their trustee in bankruptcy. To his application to sell the property they objected on behalf of the beneficiary under the will; but their objection was overruled, and a sale ordered, but without prejudice to a new petition for an accounting if the beneficiary, "or those who properly represent her," should be so advised. Such a petition was filed by the bankrupts in her behalf, and was denied, after a hearing on the merits. Subsequently the beneficiary herself filed a petition for leave to intervene, which was denied on the grounds of laches and that the prior adjudication was conclusive. *Held*, that the petitioner, being a minor, was not chargeable with laches, and that the bankrupts, even if considered formal trustees, stood in such peculiar relation to the transactions involved that they were not persons who could "properly represent" her, for which reason she was not concluded by the adjudication on their petition.

—In re Tucker, 153 Fed. 91; Tucker v. Curtin, Id.....82 C. C. A. 225

In a plenary action by the trustee of a bankrupt corporation to recover an assessment levied against the holders of unpaid stock, the decision of the bankruptcy court, authorizing such assessment, was res judicata as to the amount paid by the stockholder for his stock, the indebtedness of the corporation, and the amount of the assessment, the stockholder being only entitled to make any individual defense he might have to such action.

—In re Remington Automobile & Motor Co., 153 Fed. 345..... 82 C. C. A. 421

§ 2. Suspension, enforcement, and revival.

Where judgments rendered on certain railroad aid bonds issued by a township contained orders making it the duty of the county commissioners of the county in which the township was located to annually levy a necessary tax to make the annual interest payments on the bonds, but such judgments did not direct the clerk to thereafter issue writs of mandamus if defaults should occur in the levy of the tax, they did not contain process within themselves for their own enforcement, so that, on the board's default, it was necessary for the owner of the judgments to obtain orders of the court to compel performance.

—Board of Com'rs of Hertford County, N. C., v. Tome, 153 Fed. 81 82 C. C. A. 215

JURISDICTION.

Amount in controversy, see "Courts," § 2.
Appellate jurisdiction, see "Criminal Law," § 6.
In prosecution for offenses against customs laws, see "Customs Duties," § 4.
Of counterclaim in action of replevin, see "Set-Off and Counterclaim," § 1.
Of particular courts, see "Courts."

Digitized by Google

JURY.

Instructions in civil actions, see "Trial," § 3.
Questions for jury in criminal prosecutions, see "Criminal Law," § 4.
Taking case or question from jury at trial, see "Trial," § 2.
Verdict in civil actions, see "Trial," § 4.

§ 1. Right to trial by jury.

Plaintiff sued on a contractor's bond to secure performance of a written contract. On the trial, defendants' attorney stated that defendants might be defaulted, but that he "would like to be heard on the question of damages," and immediately thereafter suggested that the case be sent to an auditor. This was agreed to, and, though a jury was then present, an auditor was appointed, and no request was made for a jury trial at any time during the term, nor until four months after default, and after defendants had learned that the auditor's report was unfavorable, when they applied for an assessment of damages by a jury, as authorized by Rev. St. § 961 [U. S. Comp. St. 1901, p. 699]. *Held*, that the finding of the Circuit Court that the request for a jury trial was too late should not be disturbed.

—Brock v. Fuller Lumber Co., 153 Fed. 272.....82 C. C. A. 402

A written stipulation is not essential to a waiver of a jury to assess damages on a bond after default, under Rev. St. § 961 [U. S. Comp. St. 1901, p. 699], declaring that, when the sum for which judgment shall be rendered in such suit is uncertain, it shall, if either party request it, be assessed by a jury.

—Brock v. Fuller Lumber Co., 153 Fed. 272.....82 C. C. A. 402

KNOWLEDGE.

Actual or constructive knowledge, see "Notice."

LACHES.

In procuring injunction against use of trade-names, see "Trade-Marks and Trade-Names," § 1.

LANDLORD AND TENANT.

Lease distinguished from sale, see "Sales," § 5.
Mining leases, see "Mines and Minerals," § 1.

§ 1. Terms for years.

Where tenants repudiate their tenancy, deny the title of their landlord and assert title in themselves, the landlord is entitled to commence and maintain an action of unlawful detainer, without awaiting the expiration of the lease.

—Sass & Crawford v. Thomas, 152 Fed. 627.....82 C. C. A. 19

A lessor of property by a lease which was recorded and assignable without his consent is not entitled to a cancellation of such lease as against an assignee in good faith because of any transactions between the original parties of which the assignee had no knowledge or notice.

—Hubbard v. Cook, 153 Fed. 554.....82 C. C. A. 508

LAND OFFICE.

See "Public Lands," § 2.

Digitized by Google

LANDS.

See "Public Lands."

LEASES.

See "Landlord and Tenant."
Distinguished from sale, see "Sales," § 5.

LEGACIES.

See "Wills."

LETTERS PATENT.

For inventions, see "Patents."

LICENSES.

Injuries to licensees, see "Railroads," § 8.

LIENS.

See "Maritime Liens."
Effect of proceedings in bankruptcy, see "Bankruptcy," § 3.
Vendor's lien on lands sold, see "Vendor and Purchaser," § 3.

MACHINERY.

Liability of employer for defects, see "Master and Servant," § 1.
Production and use of electricity, see "Electricity."

MANDAMUS.

To compel city to levy taxes, see "Municipal Corporations," § 2.

MANDATE.

To lower court on decision on appeal or writ of error, see "Appeal and Error," § 7.

MARITIME LIENS.

§ 1. **Creation, operation, and effect.**

Where supplies of coal for a vessel were ordered and delivered at different times a bill being rendered after each delivery, the several charges do not constitute a running account, but each constitutes a separate and distinct cause of action, and to entitle the seller to a lien for any item under the New York statute notice thereof must have been filed within 30 days after such item was furnished or suit to enforce the lien must have been instituted within that time.

—The Golden Rod, 153 Fed. 171.....82 C. C. A. 345

The fact that notice of a lien filed under the New York statute for supplies furnished to a vessel did not contain the name of the owner of the

Digitized by Google

vessel is immaterial and does not invalidate the lien, where prior to the filing of such notice the claimant had instituted a suit in rem to foreclose the lien in which the vessel had been seized by the marshal.
—The Golden Rod, 153 Fed. 171.....82 C. C. A. 345

MASTER AND SERVANT.

Decisions of state court as rule of decision in United States courts, see "Courts," § 2.

§ 1. Master's liability for injuries to servant.

Plaintiff was the driver of one of several teams owned by his father, who hauled steel plates for defendant as an independent contractor. The driver of another wagon had placed the same to receive plates which were lowered by two overhead cranes, and requested plaintiff to superintend the placing of the plates in position on his wagon. Plaintiff directed the cranes to be moved slightly ahead, when defendant's servant in charge of one of the cranes moved it forward before the other crane was started, which resulted in plaintiff's injury. *Held*, that plaintiff was not a fellow servant for the time being of the crane operator.
—Otis Steel Co. v. Wingle, 152 Fed. 914.....82 C. C. A. 62

The positive, personal, and nondelegable duty of a master to provide a reasonably safe place in which, and reasonably safe appliances with which, to work, or a reasonably safe method of doing the work, is a duty of construction and provision, and not of operation.
—Kinnear Mfg. Co. v. Carlisle, 152 Fed. 933.....82 C. C. A. 81

A petition, in an action by a servant against the master to recover damages for a personal injury, does not state a cause of action, where the only negligence alleged is that of a foreman under whom plaintiff was working in directing the manner of using or handling machinery which is not alleged to have been defective or unsafe, if properly used.
—Kinnear Mfg. Co. v. Carlisle, 152 Fed. 933.....82 C. C. A. 81

Acts Tenn. 1903, p. 520, c. 237, regulating the operation of mines, requires the employment by the operator or owner of every mine, of a mine foreman who shall have a certificate of competency from an examining board, and who shall give his attention to the frequent inspection of the mine, and give all necessary directions for securing the health and safety of employés, and provides that he shall not be subject to the control of the owner or operator in the discharge of the duties required by the act. It further provides that no coal mine shall be operated for a period longer than 30 days without such certified mine foreman under penalty of a fine for each and every day after the expiration of such time. As construed by the Supreme Court of the state, such act relieves the owner or operator of a mine from liability for injuries to a miner caused by the negligence of the certified foreman in the performance of his duties. *Held*, that the provision permitting a mine to be operated for 30 days without a licensed foreman, without being subject to penalty, does not give an unlicensed foreman the standing of a lawful foreman under the act during the first 30 days of his employment, even though he is subsequently licensed, but that until so licensed the owner or operator is in control as before the act and his liability is not affected thereby.
—Cumberland Coal & Coke Co. v. Gray, 152 Fed. 939..82 C. C. A. 87

In an action against a mine owner to recover for the death of a miner, alleged to have resulted from the negligence of defendant in failing to keep its mine in safe condition, or to instruct the deceased, who was inexperienced, in respect to the peculiar dangers to which he was subjected, the evidence in support of such allegations *held* sufficient to require the submission of the case to the jury.
—Cumberland Coal & Coke Co. v. Gray, 152 Fed. 939..82 C. C. A. 87

Digitized by Google

In an action for injuries to a servant by the explosion of certain molten iron he was assisting to roll, evidence *held* to require submission to the jury of defendant's negligence in failing to properly warn plaintiff of the danger.

—Ginty v. New Haven Iron & Steel Co., 152 Fed. 979..82 C. C. A. 110

Evidence *held* insufficient to warrant a finding that the sudden raising of an elevator, by which the servant was injured, was caused by a defect in the appliances by which it was operated.

—Carnegie Steel Co. v. Byers, 149 Fed. 667.....82 C. C. A. 115

In an action for injuries to a servant by alleged defective machinery, the servant must not only show that the machinery was defective and that the injury was due to the defect, but also that the defect was known to the master for a sufficient time to have enabled him to repair, or should have been known, if there had been due inspection according to the ordinary course of prudent employers.

—Carnegie Steel Co. v. Byers, 149 Fed. 667.....82 C. C. A. 115

In an action for injuries to a servant by the alleged sudden raising of an elevator, caused by an alleged defect in the hydraulic cylinder, the mere fact of the accident was insufficient to establish negligence on the part of the master.

—Carnegie Steel Co. v. Byers, 149 Fed. 667.....82 C. C. A. 115

A wrecked train, of which intestate was the engineer being unable to conform to the regular schedule, was being run under special telegraphic orders directing it to run late, according to a special schedule therein given. The train dispatcher who issued the order testified that it "simply set the train back"; and a general rule of the company, of which the engineer had knowledge, required him to run "steadily and uniformly, adhering as closely to time as due regard for safety permits." *Held*, that such special orders should be construed merely to require the engineer to adhere to them as closely as due regard for safety permitted, and did not abrogate the standing rules of the company requiring engineers, on approaching switches, to know that they are in proper position, etc.

—St. Louis & S. F. R. Co. v. Dewees, 153 Fed. 56.....82 C. C. A. 190

Where the duties of a servant in given circumstances are particularly specified in the unambiguous and reasonable rules of the master, of which the servant has knowledge and to which he has assented by entering and continuing in the service, his nonobservance or disobedience of them at a time when they are capable of observance is negligence as matter of law, and is not to be judged by the undefined and varying requirements of ordinary care.

—St. Louis & S. F. R. Co. v. Dewees, 153 Fed. 56.....82 C. C. A. 190

Rules of a railroad company requiring the engineer to keep a careful lookout for signals, to stop the train when a signal is not understood, or is imperfectly displayed or absent from its usual place, and expressly requiring that he "must know," when approaching a switch, that it is in proper position, are reasonable and valid. And where the engineer, in approaching a known switch, at which designated and known signals were customarily displayed to indicate whether the switch was closed or open, either took proper observations, learned that the switch was open, and took chances upon being able to go safely through the same at great and unwarranted speed, or, knowing that he was approaching the switch, and not knowing whether it was closed or open, took chances on its being in proper position, and so drove into the switch when it was open, whereby the train was wrecked and he was killed, *held*, he was guilty of contributory negligence, preventing a recovery for his death.

—St. Louis & S. F. R. Co. v. Dewees, 153 Fed. 56.....82 C. C. A. 190

In an action for injuries to a servant by alleged defective appliances, the burden is on plaintiff to show that the master was negligent either

Digitized by Google

in furnishing the appliances or machinery, or that he did not exercise ordinary care in repairing and inspecting them.
—Southern Ry. Co. v. Carr, 153 Fed. 106.....82 C. C. A. 240

The duty of a master to furnish reasonably safe appliances for servants to work with, and to use ordinary care to keep them in repair, does not make the master an insurer of the safety of the servants.
—Southern Ry. Co. v. Carr, 153 Fed. 106.....82 C. C. A. 240

In an action for injuries to a servant, the court charged that, in determining whether an employé has exempted his employer from liability in any particular case because of alleged contributory negligence or assumed risk, the jury should consider the exigencies of his position and all the circumstances of the particular occasion. *Held*, that such instruction was objectionable for failure to explain the difference between the doctrine of contributory negligence and assumption of risk.
—Southern Ry. Co. v. Carr, 153 Fed. 106.....82 C. C. A. 240

The eaves of a house had slightly projected over a railroad spur track for over 15 years, during which no injury had occurred. There was ample room on top of the cars for a brakeman, in the exercise of ordinary care, to pass along the running board and manipulate the brakes without incurring any danger from the eaves; but plaintiff, though knowing the condition of the eaves, took a position on top of a car with his back toward the house, in which situation he was struck by the eaves, knocked from the car, and injured. *Held*, that the danger was an open and visible one, which plaintiff assumed.
—Southern Ry. Co. v. Carr, 153 Fed. 106.....82 C. C. A. 240

In an action for injuries to a brakeman, proof that the brakes on a railroad car failed to work at the time plaintiff was injured was not evidence that the same were defective.
—Southern Ry. Co. v. Carr, 153 Fed. 106.....82 C. C. A. 240

Where no injury had ever occurred on account of the eaves of a house projecting slightly over a railroad track for 15 years, the eaves being of a permanent character, and not liable to become impaired by use, the railroad company was not negligent in permitting them to remain in such condition.
—Southern Ry. Co. v. Carr, 153 Fed. 106.....82 C. C. A. 240

The jacking up of the end of a railroad car for the purpose of repairing the trucks was not a part of the master's duty of providing a reasonably safe place for the employés to work, but a part of the duty of the servants making the repairs, and there can be no recovery against the master for an injury resulting to a fellow servant from their negligence in doing the work, the appliances furnished by the master not being shown to have been insufficient nor defective.
—Molt v. Illinois Cent. R. Co., 153 Fed. 354.....82 C. C. A. 430

Where plaintiff, a car repairer employed by defendant railroad company, was injured while repairing the trucks which had been removed from under the end of a car by the falling of the end of the car which had been jacked up by other employés, and rested upon the jacks, there was no presumption of negligence on the part of defendant arising from the accident itself, and no ground of recovery against it for the injury was shown, in the absence of any substantive proof of its negligence or of any evidence to show what caused the car to fall.
—Molt v. Illinois Cent. R. Co., 153 Fed. 354.....82 C. C. A. 430

Plaintiff was employed in a box factory as a belt repairer and assistant to the machinery foreman, to whose orders he was subject. The freight elevator having fallen, plaintiff and the foreman started to repair it, and, without making any examination of the machinery, assumed that the elevator fell because of the breaking of the cord. A new cord was put in and a stop put on for the ground floor, when plaintiff and the foreman went up on the elevator to the second floor to put the stop on there, but before they could do so the elevator fell, injuring both of

Digitized by Google

them. After the accident a complete examination of the elevator disclosed that the drum shaft was bent, and that the sprocket wheel and gearing were so broken as to be inoperative, either of which might have caused the accident. *Held*, that plaintiff assumed the risk in assisting to put the elevator in repair.

—Reed v. Moore & McFerrin, 153 Fed. 358.....82 C. C. A. 434

Plaintiff was employed in a box factory as a belt repairer and assistant to the machinery foreman, to whose orders he was subject. The freight elevator having fallen, plaintiff and the foreman started to repair it, and, without making any examination of the machinery, assumed that the elevator fell because of the breaking of the cord. A new cord was put in, and a stop put on for the ground floor, when plaintiff and the foreman went up on the elevator to the second floor to put the stop on there; but before they could do so the elevator fell, injuring both of them. After the accident a complete examination of the elevator disclosed that the drum shaft was bent, and that the sprocket wheel and gearing were so broken as to be inoperative, either of which might have caused the accident. *Held*, that plaintiff and the foreman, while engaged in repairing the elevator, were fellow servants, so that plaintiff could not recover for the foreman's negligence in failing to discover the defects in the elevator.

—Reed v. Moore & McFerrin, 153 Fed. 358.....82 C. C. A. 434

§ 2. Liabilities for injuries to third persons.

One Perry was intrusted with the keys of the storage tanks of the Standard Oil Company at a town in Nebraska, drew oil and gasoline from them, hauled and delivered these articles to customers of the company in neighboring towns, sold them when he could at prices fixed by the company, collected the prices of the articles delivered and sold, and remitted their proceeds weekly to the company, which paid him monthly one cent a gallon of the articles thus delivered and sold. He used a wagon of the company and his own horses and selected his own routes and times to haul the oil and gasoline, and, as he was driving across a railroad track, an engine collided with the wagon and a serious injury resulted.

Held, there was substantial evidence that Perry was the agent of the company at the instant and in the act of driving upon the railroad crossing, so that the question whether he was an agent or an independent contractor was for the jury.

—Standard Oil Co. v. Parkinson, 152 Fed. 681.....82 C. C. A. 29

A master is liable for damages caused by the negligence of his servant within the scope and in the course of his employment, although he neither directs nor is aware of it.

—Standard Oil Co. v. Parkinson, 152 Fed. 681.....82 C. C. A. 29

The test of one's liability for the negligent act or omission of his alleged servant is his right and power to command and control his imputed agent in the performance of the causal act or omission at the very instant of its performance or neglect.

—Standard Oil Co. v. Parkinson, 152 Fed. 681.....82 C. C. A. 29

Plaintiff, a servant of an independent contractor, went to defendant's mill for the purpose of hauling certain steel plates for defendant. The plates were uniformly loaded on the wagons by two movable cranes, which operated simultaneously and placed the plates on the wagon in the position indicated by the driver. Plaintiff took a position on one side of the front wheels of the wagon, and directed defendant's servant in charge of the cranes to move them forward a trifle in order to drop the plates in the correct position on the wagon. The front crane was started forward by defendant's servant in charge of it without waiting to see that the other was also moving, which resulted in pulling out the front hook and permitting the plates to swing toward plaintiff and strike him, before he could escape. *Held*, that defendant was actionably negligent.

—Otis Steel Co. v. Wingle, 152 Fed. 914.....82 C. C. A. 62

Digitized by Google

Plaintiff was not, also, negligent as matter of law in standing in the position taken by him.
—Otis Steel Co. v. Wingle, 152 Fed. 914.....82 C. C. A. 62

Where a fire was negligently set by a railroad's subboss of a bridge and trestle crew, while he was sleeping in one of the railroad's boarding cars, when not on duty, his act was not performed in the business of the railroad company. Hence the latter was not liable for the result thereof at common law.
—Southern Ry. Co. v. Power Fuel Co., 152 Fed. 917..82 C. C. A. 65

MASTERS IN CHANCERY.

See "Equity," § 4.

MATERIALMEN.

Liability of surety on bond of, see "Principal and Surety," § 1.

MEASURE OF DAMAGES.

See "Damages," § 1.

MINES AND MINERALS.

Conditional sale of refuse from mine, see "Sales," § 5.
Mine owners as employers, see "Master and Servant," § 1.
Part performance taking contract for the purchase of mining claims out of operation of statute of frauds, see "Frauds, Statute of," § 1.
Refuse from mine as personal property, see "Property."

§ 1. Title, conveyances, and contracts.
Defendant, for a nominal consideration expressed therein, obtained a large number of contracts, denominated "leases," from owners of land, conveying to him the coal and other minerals under such land, with the right to mine the same for 99 years and of renewal in perpetuity. By the terms of the contracts he was to render an account to the grantors and pay royalty at specified rates whenever any coal or other mineral was mined. *Held*, that such contracts imposed obligations upon defendant, as well as vesting him with rights, a mining enterprise being clearly contemplated thereby, and that where he did not in fact intend to prosecute such enterprise, and took no steps toward it, and paid no royalties, through a period of more than 20 years, during which coal was extensively mined in the vicinity, his rights were lost by abandonment, without regard to his actual intent to retain the same, and an owner in possession under subsequent conveyances from the same grantors was entitled to maintain a suit in equity to cancel the contracts as clouds upon its title.
—Brown v. Wilmore Coal Co., 153 Fed. 143.....82 C. C. A. 295

MONOPOLIES.

§ 1. Validity and effect of grants.
While the owner of a patent or copyright is protected in his exclusive right by the statute which gives him a monopoly, there is no statute which protects one who makes or vends an article which is made by a secret process or private formula, nor, so long as he keeps his process secret, can he bring himself within the principle of the statute which grants a temporary monopoly in consideration of the full publication of the invention or work.
—John D. Park & Sons Co. v. Hartman, 153 Fed. 24..82 C. C. A. 158

Digitized by Google

§ 2. Trusts and other combinations in restraint of trade.

The fact that an article of commerce is sold under a trade-name or in a trade dress affords it no exemption from the common-law or statutory rules against restraint of trade.

—John D. Park & Sons Co. v. Hartman, 153 Fed. 24..82 C. C. A. 158

The owner of a secret process or formula is not protected by law in his secret, but he may protect himself by contract against its disclosure by one to whom it is communicated in confidence, or restrict its use by such person, and such contracts are not in restraint of trade because of the character of the property right in the secret which would be destroyed by its disclosure, and because it is not in itself an article of commerce, but such considerations do not apply to contracts for the sale of the manufactured product which do not involve a disclosure of the secret, and such contracts are within the rules against restraint of trade.

—John D. Park & Sons Co. v. Hartman, 153 Fed. 24..82 C. C. A. 158

The exemption from the common-law rule against monopoly and restraint of trade, and the provisions of the federal anti-trust act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), which has been extended to contracts affecting the sale and resale, the use or the price of articles made under a patent, or productions covered by a copyright, does not extend also to articles made under a secret process or medicine compounded under a private formula.

—John D. Park & Sons Co. v. Hartman, 153 Fed. 24..82 C. C. A. 158

A single contract, although it be such as, taken alone, may not be within the rule at common law against contracts in restraint of trade, which is one of a great number of identical contracts made between the producer of an unpatented article of commerce and dealers therein, forming a "system" of contracts, which, taken as a whole, materially affects the public interests by stifling competition and trade in said article, is an unreasonable restraint, and within the rule at common law against contracts in restraint of trade, if, from an examination of the workings of the whole system, it appears that the restraint is actually, though not ostensibly, the main result and object of the system of contracts, and not merely ancillary or incidental to another and legitimate object.

—John D. Park & Sons Co. v. Hartman, 153 Fed. 24..82 C. C. A. 158

The sole manufacturer of a medicine made in accordance with a secret formula, but unpatented, sold the same only under a system of contracts between himself and wholesale dealers to whom alone he sold at uniform prices, by which they bound themselves to sell at a certain price and only to retail dealers designated by him, and between him and such retail dealers, by which in consideration of being so designated they bound themselves to sell to consumers only and at a certain price. Such contracts had been entered into as the manufacturer alleged by a large majority of the wholesale and retail druggists in the United States. *Held*, that such system of contracts was prima facie illegal both at common law as in unreasonable restraint of trade and under the federal anti-trust act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), where it affected interstate sales: its purpose and effect being to prevent competition between purchasers of the medicine both wholesale and retail, and that, in the absence of allegation of facts showing it to be necessary for the protection of the manufacturer's business, a court of equity would not aid in the enforcement of the contracts by granting an injunction to prevent a defendant, who was not a party thereto, from buying the medicine from purchasers who were, and reselling the same at any price it might see fit.

—John D. Park & Sons Co. v. Hartman, 153 Fed. 24..82 C. C. A. 158

MORTGAGES.

As act of bankruptcy, see "Bankruptcy," § 3.
Sale of mortgaged property of bankrupt, see "Bankruptcy," § 4.

Digitized by Google

MOTIONS.

For arrest of judgment in criminal prosecutions, see "Criminal Law," § 5.
For direction of verdict in civil actions, see "Trial," § 6.
Review of discretionary rulings, on, see "Appeal and Error," § 6.

MUNICIPAL CORPORATIONS.

See "Schools and School Districts," § 1.
Street railroads, see "Street Railroads."
Taking of water and sewer systems by government in exercise of power of eminent domain, see "Eminent Domain," § 1.

§ 1. Fiscal management, public debt, securities, and taxation.

Where a city is given by statute authority to borrow money for the erection of public buildings and to issue its bonds therefor, it has not the right to use its current revenues for that purpose as against a judgment creditor, whose judgment is payable only from the surplus of such revenues above current expenses.

—Cunningham v. City of Cleveland, Tenn., 152 Fed. 907..... 82 C. C. A. 55

§ 2. Actions.

A writ of mandamus requiring a city to levy taxes for municipal purposes to the full amount permitted by statute, and to apply the surplus remaining after paying current expenses chargeable thereon in payment of a judgment against it, is continuous in its operation, and the court may modify its order from time to time to meet the exigencies of the case. It may bring in as parties officers elected after its order was made, and, while it cannot control their discretion if honestly exercised, it may exercise a supervisory power over their acts so far as necessary to insure an observance of its mandate in good faith.

—Cunningham v. City of Cleveland, Tenn., 152 Fed. 907..... 82 C. C. A. 55

NAMES.

See "Trade-Marks and Trade-Names."

NAVIGABLE WATERS.

See "Wharves."

NAVIGATION.

Rules for preventing collisions, see "Collision," § 1.

NEGATIVE PREGNANT.

See "Pleading," § 1.

NEGLIGENCE.

Applicability of instructions, see "Trial," § 3.
Causing death, see "Death," § 1.
Directing verdict in action for, see "Trial," § 2.

Digitized by Google

By particular classes of persons.

See "Carriers," §§ 2, 3; "Railroads," § 3.
Employé on vessel, see "Shipping," § 1.
Employers, see "Master and Servant," § 1.
Tugs, see "Towage."

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See "Electricity"; "Railroads," § 3.
Vessels, see "Shipping," § 2.

Contributory Negligence.

Of employé on vessel, see "Shipping," § 1.
Of passenger, see "Carriers," § 3.
Of person injured by electric wire, see "Electricity."
Of servant, see "Master and Servant," § 1.

§ 1. Contributory negligence.

One cannot—nor can one standing in his stead—recover damages for an injury to the commission of which he has directly contributed; and it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been a proximate cause of the injury, he—as also one standing in his stead—is without remedy against another, also in the wrong.

—St. Louis & S. F. R. Co. v. Dewees, 153 Fed. 56....82 C. C. A. 190

§ 2. Actions.

On the trial of an action for a personal injury, the charge of the court with respect to the question of contributory negligence *held* erroneous, in that it tended to lead the jury to determine the question of due care with reference to the particular plaintiff and his own situation and observation, and not by the standard of what a man of ordinary prudence would have done under the same circumstances.

—Gloucester Electric Co. v. Dover, 153 Fed. 139....82 C. C. A. 291

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEW TRIAL.

Costs, see "Costs," § 2.
Remand by appellate court for new trial, see "Appeal and Error," § 7.
Review of discretionary rulings on motion for, see "Appeal and Error," § 6.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of claim of maritime lien, see "Maritime Liens," § 1.
Of pendency of action involving validity of school district bonds, see "Schools and School Districts," § 1.

Digitized by Google

Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop.
—Coder v. McPherson, 152 Fed. 951; In re Coder, Id...82 C. C. A. 99

NUNC PRO TUNC.

Order nunc pro tunc as curing delay in suing out writ of error in criminal prosecution, see "Criminal Law," § 6.

OBJECTIONS.

At trial in civil action, see "Trial," § 1.

OFFER.

Of proof, see "Trial," § 1.

OFFICERS.

Internal Revenue officers, see "Internal Revenue."
Sufficiency of service on officers of association to make it a party, see "Parties," § 1.

OLEOMARGARINE.

Penalty for offense against oleomargarine act, see "Internal Revenue."

OPTIONS.

Specific performance of, see "Specific Performance," §§ 1, 2.

ORDER OF PROOF.

At trial, see "Trial," § 1.

ORDERS.

Appealability of orders in bankruptcy, see "Bankruptcy," § 9.
Review of appealable orders in general, see "Appeal and Error."

PARENT AND CHILD.

Habeas corpus for custody of minor enlisting in navy, see "Habeas Corpus," § 1.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 2.

PARTIES.

In action for injunction, see "Injunction," § 2.
Persons concluded by judgment, see "Judgment," § 1.
Review of questions as to parties, as dependent on presentation in lower court of grounds of review, see "Appeal and Review," § 2.

Digitized by Google

§ 1. Defendants.

A voluntary association having many members may be brought into court under equity rule 48, by service on its officers, and such of its members as are known and can be conveniently reached; sufficient being served to represent all the diverse interests.

—Evenson v. Spaulding, 150 Fed. 517.....82 C. C. A. 263

PARTNERSHIP.

See "Associations."
Bankruptcy of, see "Bankruptcy," § 1.

PASSENGERS.

See "Carriers," § 3.

PATENTS.

§ 1. Patentability.

A machine fully embodying a device subsequently patented by another does not lose its effect as an anticipation because its use was abandoned, solely for the reason that the product in making which it was employed was not successful, where it is shown that the machine operated successfully, and that the maker did not abandon the invention embodied therein.

—United Shoe Machinery Co. v. Greenman, 153 Fed. 283.....
82 C. C. A. 581

§ 2. Term.

The Thomson patent, No. 448,894, for an electric meter, expired on July 8, 1904, with the British patent for the same invention.

—Thomson-Houston Electric Co. v. McLean, 153 Fed. 883.....
82 C. C. A. 629

The rule applied that a patent is not exempted from the operation of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], making it expire with a prior foreign patent for the same invention, because there may be differences in detail between the devices of the two patents, unless such differences affect the essence of the invention in a patentable sense.

—Thomson-Houston Electric Co. v. McLean, 153 Fed. 883.....
82 C. C. A. 629

§ 3. Infringement.

Where the answer in a suit in equity for infringement of a patent denies the validity of the patent, and asserts the right of defendant to make and vend the machine covered thereby, and also by implication admits an allegation of the bill that it has on hand and is offering for sale a large number of infringing machines, a mere averment that it ceased selling an alleged infringing machine prior to the commencement of the suit, and has no intention of using or selling any machines embodying the features of the patent, not supported by any clear proof, is not such a disclaimer as will deprive the complainant of the right to an injunction.

—Deere & Webber Co. v. Dowagiac Mfg. Co., 153 Fed. 177.....
82 C. C. A. 351

Under the rule that answers in equity must be full, unequivocal, and responsive to the bill, where a bill for infringement of a patent alleges past and present infringement, and that defendant then had on hand a large number of infringing machines which it was offering for sale, an answer which admits that defendant had previously sold a machine which had been adjudged an infringement, but alleges that it had ceased selling the same "long prior" to the beginning of the suit and returned the parts on hand to the manufacturer, and since "that time" had sold no machines of that character, is indefinite and evasive and not responsive, and must

Digitized by Google

be treated as admitting the averment that defendant had infringing machines on hand which it was offering for sale.
—Deere & Webber Co. v. Dowagiac Mfg. Co., 153 Fed. 177..... 82 C. C. A. 351

Where the invalidity of a patent for lack of invention is clear upon its face, the court may so declare it sua sponte, although the question is not raised by the pleadings, and may dismiss a bill for its infringement.
—Wills v. Scranton Cold Storage & Warehouse Co., 153 Fed. 181.... 82 C. C. A. 355

It is not open to a defendant on the question of additional infringements after a decree adjudging infringement by one device to refer to the prior art to limit the scope of the invention to less than was found by the court on the original hearing.
—Murray v. Orr & Lockett Hardware Co., 153 Fed. 369..... 82 C. C. A. 445

Where a patent has been adjudged valid and infringed and an accounting ordered, it is the better practice to require the complainant to set up any alleged new infringements by supplemental bill, which can be disposed of and the order of reference modified as required, rather than to extend the accounting to devices which have not been adjudged to infringe and entail costs upon the parties which may prove unnecessary.
—Murray v. Orr & Lockett Hardware Co., 153 Fed. 369..... 82 C. C. A. 445

Complainant manufactured and sold without restriction two styles of patented cash registers and indicators, numbered, respectively, 78 and 79. The two were alike, except that No. 79 contained an additional printing device, which, in combination with the other parts, was covered by a separate patent. Defendants, becoming the lawful owners of a No. 79 machine, removed the printing device therefrom and supplied and attached it to a No. 78 machine of another owner, charging and receiving payment therefor, and making, in effect, a No. 79 machine. *Held*, that such action was an infringement of the right to manufacture the patented combination, with which complainant had not parted by the sale of the No. 78 machine.
—National Cash Register Co. v. Grobet, 153 Fed. 905..... 82 C. C. A. 651

The showing on a motion for a preliminary injunction to restrain infringement of a number of unadjudicated patents, relating to electric railway signals, *held* to present too many elements of doubt to warrant the granting of an injunction.
—Hall-Signal Co. v. General Ry. Signal Co., 153 Fed. 907..... 82 C. C. A. 653

§ 4. Decisions on the validity, construction, and infringement of particular patents.

The Murray patent, No. 442,531, for a store service ladder, *held* infringed.
—Murray v. Orr & Lockett Hardware Co., 153 Fed. 369..... 82 C. C. A. 445

The Hoyt patent, No. 446,230, for a grain drill, *held* valid and infringed.
—Deere & Webber Co. v. Dowagiac Mfg. Co., 153 Fed. 177..... 82 C. C. A. 351

The Stanley patent, No. 469,809, for a system of electrical distribution, was not anticipated, and claims 1 and 3 cover combinations including a converter in which the length of wire in the primary coil is substantially the same as would result from following the so called "Stanley rule," and are infringed by a converter having such length of wire irrespective of the rule or method by which such length was ascertained.
—Westinghouse Electric Mfg. Co. v. Montgomery Electric Light & Power Co., 153 Fed. 890.....82 C. C. A. 636

Digitized by Google

The Claus patent, No. 527,361, for an improvement in enameling metal ware, *held* void as to claims 1, 2, and 3, and not infringed as to claims 9, 10, 11, and 12.

—National Enameling & Stamping Co. v. New England Enameling Co., 153 Fed. 184.....82 C. C. A. 359

The Dresser patent, No. 625,155, for pipe coupling designed to unite the ends of sections of pipe and to insulate them from each other to prevent electrolysis, was not anticipated and discloses invention. Also *held* infringed.

—Worcester County Gas Co. v. Dresser, 153 Fed. 903..82 C. C. A. 649

The Davey & Ladd patent, No. 672,056, for a clutch for starting and stopping machines, is void for anticipation by the clutch previously employed in the Stiles-Thomson machine for setting lacing studs in shoes.

—United Shoe Machinery Co. v. Greenman, 153 Fed. 283..... 82 C. C. A. 581

The Wills reissued patent, No. 12,300 (original No. 742,540), for a refrigerator building the essential feature of which is the use of flaps or other devices for closing the space between the elevator car and the sides of the shaft to prevent the escape of cold air from the refrigerating rooms when the elevator is in use, is manifestly void on its face for lack of invention.

—Wills v. Scranton Cold Storage & Warehouse Co., 153 Fed. 181 82 C. C. A. 355

---

§ 5. Patents enumerated.

UNITED STATES.

ORIGINAL.

18,116. Pipe coupling, cited..... 650
299,206. Pipe coupling, cited..... 650
389,797. Pipe coupling, cited..... 650
432,654. Electric meter, cited..... 632
442,531. Store service ladder, held infringed 445
446,230. Grain drill, held valid and infringed 351
448,894. Electric meter, held to have expired with the British patent 630
469,809. Electrical converters, was not anticipated, and claims 1 and 3 held infringed.. 636
483,511. Cash register, cited..... 651
497,864. Grain drill, cited..... 352
527,361. Enameling metal ware, held void as to claims 1, 2 and 3, and not infringed as to claims 9, 10, 11 and 12.. 359
625,155. Pipe coupling, not anticipated, also held infringed 649
672,056. Clutch for starting and stopping machines, held void for anticipation.... 581
742,540. Refrigerator building, held void for lack of invention 355
791,217. Process and apparatus for manufacturing wire glass, cited..... 587

REISSUE.

12,300. Refrigerator building, held void for lack of invention 355
12,433. Apparatus and process for manufacturing wire glass, cited..... 588

PAYMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 1. To principal as discharge of surety, see "Principal and Surety," § 2.

§ 1. Operation and effect.

Payment of an obligation of another by a third party does not discharge it as between the original parties unless the payment is made and received with the intention that it shall do so.

—Bradley v. Lehigh Valley R. Co., 153 Fed. 350.....82 C. C. A. 426

PENALTIES.

For offense against oleomargarine act, see "Internal Revenue."

Digitized by Google

PERFORMANCE.

Of contract, see "Contracts," § 2.

PERJURY.

Conspiracy to commit an offense against the United States by subornation of perjury, see "Conspiracy," § 1.

§ 1. Offenses and responsibility therefor.

Under Timber & Stone Act June 3, 1878, § 1, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], which requires applicants to purchase land thereunder to file a verified written statement, and after the required publication of notice to "furnish to the register of the Land Office satisfactory evidence" of certain facts, the regulations of the Land Department, requiring such evidence to be in the form of depositions under oath, are in furtherance of the purposes of the statute and valid, and false swearing in either the preliminary statement or in such depositions constitutes the crime of perjury and an offense against the United States, under Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653].

—Van Gesner v. United States, 153 Fed. 46; Biggs v. Same, Id.; Williamson v. Same, Id. ..... 82 C. C. A. 180.

PERSONAL INJURIES.

Particular causes or means of injury.

See "Electricity"; "Negligence."
Operation of railroads, see "Railroads," § 3.

Particular classes of persons injured.

Employé, see "Master and Servant," § 1.
Employé on vessel, see "Shipping," § 1.
Passenger, see "Carriers," § 3.

Remedies.

Harmless error in general, see "Appeal and Error," § 6.
Res gestæ, see "Evidence," § 1.

PERSONAL PROPERTY.

See "Property."

PETITION.

For removal of cause, see "Removal of Causes," § 2.
In bankruptcy, see "Bankruptcy," § 1.

PIERS.

See "Wharves."

PLEA.

In civil actions, see "Pleading," § 1.

Digitized by Google

PLEADING.

Applicability of instructions to pleadings, see "Trial," § 3.

In particular actions or proceedings.

See "Equity," § 2.
For infringement of patent, see "Patents," § 3.
Indictment or criminal information or complaint, see "Indictment and Information."
To remove cause, see "Removal of Causes," § 2.

§ 1. Plea or answer, cross-complaint, and affidavit of defense.

Pleas which are evasive or double are bad.
—United States v. Larkin, 153 Fed. 113.....82 C. C. A. 247

A negative pregnant is not a good plea for any purpose.
—United States v. Larkin, 153 Fed. 113.....82 C. C. A. 247

§ 2. Issues, proof and variance.

Under the rule of practice in Nebraska, which governs in actions at law in a federal court in that state, a general denial in an answer is treated as qualified by admissions made in other defenses; and where, in an action on school district bonds, the answer contained a general denial, but also an admission of the execution and genuineness of the bonds, and pleaded their invalidity, the admission governs, and the plaintiff was not required to prove their execution and genuineness.
—School Dist. No. 11, Dakota County, Neb., v. Chapman, 152 Fed. 887 82 C. C. A. 35

Where a special plea setting up the defense of fraud was properly stricken out as not sufficiently specific, the defendant is not entitled to introduce such defense under the plea of general issue by cross-examination of plaintiff's witnesses.
—Payne v. Knickerbocker Trust Co., 153 Fed. 176...82 C. C. A. 350

PLEDGES.

Bankruptcy of pledgee, see "Bankruptcy," § 2.
Distinguished from sale, see "Sales," § 1.

POLICY.

Of insurance, see "Insurance."

POST OFFICE.

Evidence of other offenses in prosecution for offense against postal laws, see "Criminal Law," § 3.
Province of court and jury in prosecution for offense against postal laws, see "Criminal Law," § 4.
Relevancy of evidence in prosecution for offense against postal laws, see "Criminal Law," § 3.

PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 2.
In land office, see "Public Lands," § 2.
Procedure of particular courts, see "Courts."

Digitized by Google

Particular proceedings in actions.

See "Costs"; "Evidence"; "Judgment"; "Jury"; "Parties"; "Pleading"; "Removal of Causes"; "Trial."

Verdict, see "Trial," § 4.

Particular remedies in or incident to actions.

See "Injunction."

Procedure in criminal prosecutions.

See "Criminal Law."

Procedure in exercise of special or limited jurisdiction.

In admiralty, see "Collision," § 6.
In bankruptcy, see "Bankruptcy," § 1.
In equity, see "Equity."

Procedure on review.

See "Appeal and Error"; "Exceptions, Bill of."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 8.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 6.

PRELIMINARY INJUNCTION.

See "Injunction," § 3.

PRINCIPAL AND AGENT.

§ 1. Rights and liabilities as to third persons.

Evidence considered, and *held* insufficient to entitle a complainant to an accounting from his agents on the ground of their having fraudulently induced him to lease property for less than its fair rental value.

—Hubbard v. Cook, 153 Fed. 554.....82 C. C. A. 508

PRINCIPAL AND SURETY.

Right to trial by jury in action on bond, see "Jury," § 1.

§ 1. Nature and extent of liability of surety.

While, in a bond for the fulfillment by materialmen of an agreement to furnish certain material to one who was constructing a building, a provision to indemnify and save harmless from all damages in the premises may impose something more than the mere obligation to see to the fulfillment of the agreement so far as concerns the delivery of material, the obligation is none the less one of suretyship, imposing the reciprocal duty on the other party to not depart from it to the surety's detriment.

—Fidelity & Deposit Co. v. Agnew, 152 Fed. 955....82 C. C. A. 103

A bond given by a bidder for government work conditioned that if his bid was accepted he would enter into a contract and furnish a bond for its performance within 10 days, or, in case of his failure to do so, the sureties would pay to the United States "the difference in money be-

Digitized by Google

tween the amount of the bid of said bidder so accepted and the amount for which the proper officer of the United States may contract with another party to do the work proposed, if the latter amount be in excess of the former," contemplates that, if the bidder fails to enter into a formal and binding contract in accordance with his proposal, the government may relet the work and enter into an essentially similar contract with another party, and then look to the sureties for indemnity to the extent of its loss. When such second contract is let, the measure of the sureties' liability is fixed at the difference in price under such contract and the bid of their principal, and cannot be affected by the fact that the contractor fails to complete the work and a third contract is made whether at greater or less cost to the government.

—Brown v. United States, 152 Fed. 964.....82 C. C. A. 318

Defendants became sureties on the bond of a bidder for a government contract for furnishing and laying in place toward the construction of a riprap breakwater such a quantity of stone "dependent upon the price per ton of stone bid" as could be furnished in place for $45,000; the bond being conditioned that if the bid was accepted and the bidder failed to enter into the contract defendants would pay to the United States the difference in money between the amount of the bid so accepted, and the amount for which the government might contract with another party to do the work proposed, if the latter amount should be in excess of the former. The bid was accepted, but the bidder failed to enter into contract, and the work was let under the same conditions to a second bidder at an increased price per ton for stone; the necessary result being that the second bidder was required to furnish a smaller quantity of stone. *Held*, that such fact did not render the second contract one for doing substantially different work from that proposed by the first bid, so as to relieve defendants from liability, but that they were liable for the value of the stone in place which the government would have obtained under the first bid in excess of that which it obtained under the second at the price bid by their principal.

—Brown v. United States, 152 Fed. 964.....82 C. C. A. 318

§ 2. Discharge of surety.

The provision in a building or working contract that the contractor or builder shall be paid as the work progresses according to the amount of materials furnished or work performed, upon estimates to be made by the supervising architect or engineer, whether a percentage is to be retained therefrom until the whole is done or not, redounds to the benefit of a surety or guarantor of the party who is to fulfill the contract; and, upon payment being made in disregard of it, there is such a departure from the contract upon which the undertaking of the surety or guarantor is based that he is released.

—Fidelity & Deposit Co. v. Agnew, 152 Fed. 955....82 C. C. A. 103

No doubt in such a case the builder to whom the material is to be furnished is not chargeable with the inefficiency or mistakes of the architect, provided an attempt at an estimate is really made; and, in the absence of notice to the contrary, an approval of the invoices may be sufficient for him to act upon, without a formal certificate, nothing being said about that in the agreement. But not only may the deficiencies be so gross as to put him on inquiry, but where to his certain knowledge the only basis for the architect's approval is the invoices on which the material was shipped and the representations made at the time by the builder himself or his representative, being thus fully advised as to how such approvals are obtained, they are only available to him for what they stand.

—Fidelity & Deposit Co. v. Agnew, 152 Fed. 955....82 C. C. A. 103

Where, early in the performance of an agreement of the character specified, and when but little material had been delivered, the materialmen, needing money, applied to the builder for an advance, to be paid back by the shipment of material, and, the builder not being able to accommodate them himself, it was arranged that they should execute a note, which

Digitized by Google

he indorsed and had discounted at the bank where he did business, the materialmen receiving the proceeds, and the understanding being that it should be met by the shipment of material, no payment thereafter being made to the materialmen, but the value of the material shipped by them being accounted for to the bank by the builder and there credited, and the first loan which was paid being succeeded by others from time to time, all of which were finally met in this way, *held*, that the transaction could not be treated as merely an accommodation loan, to which the builder lent the security of his name, but that it constituted an advance of money upon the agreement, to be repaid by a delivery of material; the materialmen as the result having put into their hands a large sum in advance and anticipation of deliveries, in disregard of the agreement, depriving the surety of the protection and incentive of restricted payments to its prejudice, thereby releasing it from its undertaking.
—Fidelity & Deposit Co. v. Agnew, 152 Fed. 955....82 C. C. A. 103

§ 3. Remedies of creditors.
Where, under an agreement to furnish material for the construction of a building, to be paid for in monthly installments, upon estimates made by the architect in charge of the work of the material on the ground delivered during the preceding month, of which 10 per cent. was to be retained until 30 days after all the material had been delivered and accepted, and satisfactory proof made that there were no liens, the only evidence as to such estimates was that the supervising architect approved the invoices on which the material was billed from the quarry, after going over them at the end of each month with the contractor of the building, or his representative, in a suit against the surety on the bond given to the contractor by the materialmen for the performance of their agreement, *held*, that the defendant was entitled to a verdict.
—Fidelity & Deposit Co. v. Agnew, 152 Fed. 955....82 C. C. A. 103

PRIORITIES.

Between claims against estate of bankrupt, see "Bankruptcy," § 6.

PRIVILEGE.

Of witness as to testimony, see "Witnesses," § 2.

PROCESS.

See "Injunction."
Sufficiency of service on members as making association a party, see "Parties," § 1.

PROMISSORY NOTES.

See "Bills and Notes."

PROOF.

Taking and filing proof in equity, see "Equity," § 3.

PROPERTY.

See "Mines and Minerals"; "Shipping."
Protection of rights of property by injunction, see "Injunction," § 1.
Taking for public use, see "Eminent Domain."

Digitized by Google

Trees growing on land constitute a part of the realty as provided by Ga. Code 1895, § 3045.
—Marthinson v. King, 150 Fed. 48.....82 C. C. A. 360

Slag, dumped as refuse from an ore smelter or mill while ordinarily appurtenant to the land on which it is dumped, may be treated by the owner of both the land and dump as personalty, and may be sold and delivered as such.
—Manson v. Dayton, 153 Fed. 258; Jarmuth v. Same, Id..... 82 C. C. A. 588

PROVINCE OF COURT AND JURY.

In criminal prosecutions, see "Criminal Law," § 4.

PUBLIC DEBT.

See "Municipal Corporations," § 1; "Schools and School Districts," § 1.

PUBLIC LANDS.

Arrest of judgment in prosecution for conspiracy to defraud the United States of public lands, see "Criminal Law," § 5.
Conspiracy to defraud by fraudulent homestead entries on, see "Conspiracy," § 1.
Perjury in proceeding to purchase public land, see "Perjury," § 1.

§ 1. Government ownership.

In statutes and in common parlance the word "entries," when applied to proceedings in the land office under the homestead law, is used with various meanings—sometimes in the sense of preliminary entries, at other times in the sense of final entries, and again in the sense of the proceedings as a whole.
—Stearns v. United States, 152 Fed. 900.....82 C. C. A. 48

The words "public lands," used in connection with entries in the land offices of the United States, if nothing be said to the contrary, relate to lands of the United States which are subject to disposition in some form under the public land laws, and not to those which are set apart and used for some special public purpose, such as post office sites, military reservations, and the like.
—Stearns v. United States, 152 Fed. 900.....82 C. C. A. 48

Not all public lands are subject to homestead entry, and yet such an entry may be employed as a means of defrauding the United States of public lands not subject to disposal in that way, as where the exception turns upon a question of fact, such as whether the lands contain valuable coal or mineral deposits.
—Stearns v. United States, 152 Fed. 900.....82 C. C. A. 48

§ 2. Survey and disposal of lands of United States.

The Land Department of the United States has the power to make reasonable rules and regulations, not inconsistent with any valid law, for the purpose of giving effect to the provisions of the acts of Congress providing for the disposition of the public lands, which have the force and effect of law, and of which the courts take judicial notice.
—Van Gesner v. United States, 153 Fed. 46; Biggs v. Same, Id.; Williamson v. Same, Id.....82 C. C. A. 180

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

Digitized by Google

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUNISHMENT.

See "Criminal Law," § 7.

QUESTIONS FOR JURY.

In criminal prosecutions, see "Criminal Law," § 4.

QUIETING TITLE.

Cancellation of mining contract as cloud on title, see "Mines and Minerals," § 1.

RAILROADS.

See "Street Railroads."
As employers, see "Master and Servant."
Carriage of goods and passengers, see "Carriers."
Conclusiveness of judgment in action on railroad aid bonds, see "Judgment," § 1.
Covenant in deed conveying right of way as distinguished from conditions subsequent, see "Covenants," § 1.
Decision of state court in action on railroad aid bonds as rule of decision in United States court, see "Courts," § 2.
Enforcement of judgment in action on railroad aid bonds, see "Judgment," § 2.
Examination of witnesses in action for death caused by operation of, see "Witnesses," § 2.

§ 1. Right of way and other interests in land.

A railroad company, which wrongfully obtained and held possession of a right of way for a spur track to reach certain industries which rightfully belonged to another company, is not entitled to retain such possession as against the rightful owner, on the ground of abandonment because of the construction by the latter of a spur track over another route, where it appeared that such construction was necessitated by its inability to obtain possession of the right of way in dispute, and was temporary only, and without any intention to abandon its rights which were in litigation.

—Atlanta, K. & N. Ry. Co. v. Southern Ry. Co., 153 Fed. 122..... 82 C. C. A. 256

§ 2. Sales, leases, traffic contracts, and consolidation.

Rev. St. Ohio 1892, § 3300, authorizes any railroad company to purchase any part or all of a railroad constructed or in course of construction by another company, if the lines are continuous or connecting and not competing, and declares that after such purchase the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion, and operation of such railroad, and shall be subject to all the "duties, obligations and restrictions" of the former company. *Held*, that a claim for breach of a contract to transport plaintiff's stone for a specified rate existing against a railroad company, whose line was purchased by defendant, was not an "obligation" which defendant was bound to perform under such section; defendant never having agreed to assume such liability.

—Rice v. Norfolk & W. Ry. Co., 153 Fed. 497.....82 C. C. A. 447

Digitized by Google

§ 3. **Operation.**

Civ. Code S. C. 1902, § 2135, provides that every railroad corporation shall be responsible in damages to any person or corporation whose building or other property shall be injured by fire communicated by its locomotive engines or originating within the limits of the railroad's right of way in consequence of the act of any of its authorized agents or employés. *Held*, that where a fire was started by the negligence of the subboss of a railroad bridge and trestle crew, while using a boarding car as a place to sleep during the night, when he was not on duty, he was neither an agent nor employé of defendant within such section, and hence the company was not liable for the result of his acts thereunder.

—Southern Ry. Co. v. Power Fuel Co., 152 Fed. 917..82 C. C. A. 65

Intestate, an intelligent girl, 16 years of age, was struck and killed by an engine as she was walking along a cinder path at the ends of the ties, which path had been used by the public as a short cut from a street to a depot. There was a semaphore so located about half the length of the path that, if one passed on the side toward the rails, he would get so close to them as to be struck by a passing engine, and this was what intestate did, without looking behind her to see whether a train was approaching, though by getting over or under the semaphore wires, and walking on some rough stones for a few steps, she could have passed the semaphore on the opposite side in safety. It was not shown that the engineer was reckless or grossly negligent in operating the train, nor in failing to anticipate that decedent would walk inside the semaphore. *Held*, that decedent's act constituted a violation of Railroad Law N. Y. § 53 (Laws 1892, p. 1394, c. 676), prohibiting persons not employés from walking along railroad tracks, except where the same should be laid along or across streets or highways, in which case he shall not walk on the track, unless necessary to cross the same, and that defendant was therefore not liable for decedent's death.

—Butler v. New York Cent. & H. R. R. Co., 152 Fed. 976..... 82 C. C. A. 330

In general, in the absence of a regulating statute or ordinance, a carrier may run its trains at such a rate of speed as it deems convenient for the conduct of its business, without being guilty of negligence per se in case a derailment occurs resulting in injuries to licensees on the train.

—Chicago & N. W. Ry. Co. v. O'Brien, 153 Fed. 511..82 C. C. A. 461

Where defendant railroad company operated a fast mail train down a descending grade of 60 feet to the mile, and at the sharpest point of a 6 degree curve at the foot of the grade, at the rate of from 70 to 75 miles per hour, without slackening speed, and the train was derailed at the curve, resulting in the death of plaintiff's intestate, an express messenger working on the train, whether defendant was guilty of negligence was for the jury.

—Chicago & N. W. Ry. Co. v. O'Brien, 153 Fed. 511..82 C. C. A. 461

RATES.

Discrimination as to by carrier, see "Carriers," §§ 1, 2.

REAL PROPERTY.

See "Property."

REBATES.

Concessions and discriminations by carrier, see "Carriers," § 1.

Digitized by Google

REBUTTAL.

Evidence, see "Trial," § 1.

RECORDS.

Transcript on appeal or writ of error, see "Appeal and Error," § 4; "Criminal Law," § 6.

REFERENCE.

In suit for infringement of patent, see "Patents," § 3.
To master or commissioner in equity, see "Equity," § 4.

RELEASE.

See "Payment."
Of surety, see "Principal and Surety," § 2.

RELEVANCY.

Of evidence in criminal prosecutions, see "Criminal Law," § 3.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 7.

REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1; "Specific Performance," § 1.
Effect on jurisdiction of equity in action against legatee, see "Wills," § 1.

REMOVAL OF CAUSES.

§ 1. Power to remove and right of removal in general.
A federal court cannot acquire jurisdiction by removal of a suit in which such jurisdiction is dependent on diversity of citizenship, where neither of the parties is a resident of the district, and the plaintiff does not consent to such jurisdiction or waive his rights.
—Southern Pac. Co. v. Burch, 152 Fed. 168.....82 C. C. A. 34

§ 2. Proceedings to procure and effect of removal.
Averments of fact in a petition for removal, in the absence of some denial by answer or by comparison with the record, must be taken as admitted, and, if sufficient upon their face to justify a removal, all other questions out of the way, will sustain the jurisdiction of the Circuit Court.
—Atlanta, K. & N. Ry. Co. v. Southern Ry. Co., 153 Fed. 122.....
82 C. C. A. 256

REPEAL.

Of statutes, see "Statutes," § 3

REPLEVIN.

Counterclaim in action of, see "Set-Off and Counterclaim," § 1.

Digitized by Google

RESCISSION.

Of contract for sale of land, see "Vendor and Purchaser," § 2.
Of sale, see "Sales," § 1.

RES GESTÆ.

In civil actions, see "Evidence," § 1.

RESIDENCE.

As affecting jurisdiction of court on removal of cause, see "Removal of Causes," § 1.

RES JUDICATA.

See "Judgment," § 1.

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 2.

REVENUE.

See "Internal Revenue."

REVIEW.

See "Appeal and Error"; "Criminal Law," § 6.

RIGHT OF WAY.

Of railroads, see "Railroads," § 1.

RISKS.

Assumed by employé, see "Master and Servant," § 1.

RULES.

For government of employés, see "Master and Servant," § 1.

RULES OF COURT.

Taxation of costs, see "Costs," § 2.

RULES OF NAVIGATION.

See "Collision," § 1.

SALES.

Contracts of, in restraint of trade, see "Monopolies," § 2.

Digitized by Google

Sales by or to particular classes of persons.

Internal Revenue officers, see "Internal Revenue."
Trustee in bankruptcy, see "Bankruptcy," § 4.

Sales of particular species of, or estates or interests in, property.

See "Railroads," § 2.
Corporate stock, see "Corporations," § 2.
Realty, see "Vendor and Purchaser."

§ 1. Requisites and validity of contract.

B., being desirous of reorganizing the business of K. & Co., who were indebted to claimant, organized the E. Company, of the preferred stock of which claimant agreed to accept $5,000 of K. & Co.'s indebtedness, with a bonus of 20 per cent. common stock, and agreed not to press the new corporation for the remaining indebtedness so long as claimant felt assured of its ultimate success, it being also agreed that B., through the new corporation, should sell to others the full preferred capital stock issue of the company and redeem within 18 months the preferred stock and bonus which claimant agreed to accept as a temporary arrangement to further a reorganization, but before this could be accomplished the new corporation became a bankrupt. *Held*, that claimant's arrangement constituted a pledge of the new corporation's stock as security for the debt of K. & Co., and not a sale of such stock.

—In re United Educational Co., 153 Fed. 169; Appeal of Perkins-Goodwin Co., Id.....82 C. C. A. 343

While a purchaser, who stands on an equal footing with the seller as to access to means of obtaining knowledge of the value of the thing sold, is not bound to disclose any knowledge he may have on the subject, if in addition to keeping silent as to such knowledge he makes any statement which tends affirmatively to the suppression of the truth, or is calculated to deceive the seller, or to distract his attention from the real facts, his concealment becomes fraudulent, and will afford ground for a rescission of the sale.

—Files v. Rankin, 153 Fed. 537.....82 C. C. A. 491

Defendant purchased from the receiver of a national bank for $25 a judgment held by the bank against a deceased debtor amounting to over $9,000. At the time of the sale, the bank held, as collateral to the judgment, an assignment of a claim in favor of the debtor against an insolvent firm whose assets were being administered by the court, which was of considerable value, and on which a dividend had been declared and was then payable, amounting to nearly $900. Defendant knew of this collateral, but the receiver did not, having succeeded prior receivers who had lost the evidence of the transfer, and there being nothing on the receivers' books to put him on inquiry. Nor did the record in the insolvency case show that the bank was the owner of the claim. The receiver lived at a distance, and the negotiations for the purchase were conducted by correspondence, in which defendant made no mention of the collateral, but stated his understanding that the debtor had died insolvent after going through bankruptcy, and suggested that the claim would soon be barred by limitation, and that if handled at once a small sum might be realized, but even that was very doubtful. *Held*, that such statements and suggestions amounted to an active and fraudulent concealment of the facts, and entitled the receiver to a rescission of the sale.

—Files v. Rankin, 153 Fed. 537.....82 C. C. A. 491

§ 2. Construction of contract.

An order for lumber given in January, 1902, stating that "you may enter our order for 4,000,000 feet of shipping cull poplar of same grading as that furnished us by you during the year 1901 and in accordance with our contract dated February 18, 1901," did not render the contract made by its acceptance a continuation of the prior contract, which is referred to merely in connection with the grade, and especially where the price

Digitized by Google

named was different, and a breach of the first contract by the purchaser afforded no ground for the refusal of the seller to perform the second.

—W. M. Ritter Lumber Co. v. Lestershire Lumber & Box Co., 153 Fed. 575.....82 C. C. A. 529

§ 3. Performance of contract.

Under a contract for the sale of a cargo of foreign iron to be delivered from the ship, custom house charges paid, the unloading of the iron on a wharf, from which it was being removed by the purchaser without any objection to the quality or quantity at the time of its loss, and the payment of the duties constituted such a delivery as to pass the title.

—William H. Perry Co. v. Klosters Aktie Bolag, 152 Fed. 967..... 82 C. C. A. 321

§ 4. Warranties.

A provision of an executory contract for a sale of lumber that "it is understood that this stock will be dry and in condition to work on arrival," if construed as a warranty, is not one which survived the acceptance and retention of the lumber by the purchaser, under the law as settled by decision in New York; the condition of the lumber being obvious on inspection.

—Lestershire Lumber & Box Co. v. W. M. Ritter Lumber Co., 153 Fed. 573.....82 C. C. A. 527

§ 5. Conditional sales.

Where the right to reclaim property conditionally sold is reserved to the seller in the event of the failure of the purchaser to make payment of any installment of the purchase price, he may not retake and appropriate the property, and also recover the unpaid installments of the purchase price; but his remedy is in the alternative, unless the contrary is so clearly provided as to leave no reasonable doubt that such was the intention of the parties.

—Manson v. Dayton, 153 Fed. 258; Jarmuth v. Same, Id..... 82 C. C. A. 588

The owner of land on which there were dumps of slag and smelter products entered into a contract denominated a "lease," by which he purported to lease the land for a stated term, with the right to remove the dumps on payment of a series of notes maturing at intervals through a portion of the term. The contract provided, in effect, that removal of the dumps should proceed only in proportion as payments were made, that when all the dumps were removed the lease should terminate, and that on payment of all the notes on or before maturity the lessee should be entitled to a bill of sale of the dumps, with the right to remove the same within a specified term. It further provided that: "It is mutually agreed that all work on the said above described slag, slag dumps and materials and smelter products shall be performed in a thoroughly workmanlike manner, and that any failure of the said party of the first part to do or keep any of the agreements herein, * * * or any failure to pay immediately when due any one or more of said 100 promissory notes, * * * shall work a forfeiture of all rights of the said party of the first part under this agreement, and the said party of the second part shall have the right * * * to declare each and every one and all of the said 100 promissory notes, or whatever number of the said notes may remain unpaid, * * * immediately due and payable, and * * * to collect the same, * * * and in case of forfeiture as aforesaid all work done and money expended by the said party of the first part shall inure to the party of the second part as liquidated damages, * * * and the said party * * * may thereupon * * * enter upon said premises and dispossess all persons occupying the same." *Held*, that such transaction was not a lease, but a conditional sale of the material in the dumps.

—Manson v. Dayton, 153 Fed. 258; Jarmuth v. Same, Id..... 82 C. C. A. 588

The owner of land on which there were dumps of slag and smelter products entered into a contract denominated a "lease," by which he purported

Digitized by Google

to lease the land for a stated term, with the right to remove the dumps on payment of a series of notes maturing at intervals through a portion of the term. The contract provided, in effect, that removal of the dumps should proceed only in proportion as payments were made, that when all the dumps were removed the lease should terminate, and that on payment of all the notes on or before maturity the lessee should be entitled to a bill of sale of the dumps, with the right to remove the same within a specified term. It further provided: "It is mutually agreed that all work on the said above described slag, slag dumps, and materials and smelter products shall be performed in a thoroughly workmanlike manner, and that any failure of the said party of the first part to do or keep any of the agreements herein, * * * or any failure to pay immediately when due any one or more of said 100 promissory notes, * * * shall work a forfeiture of all rights of the said party of the first part under this agreement, and the said party of the second part shall have the right * * * to declare each and every one and all of the said 100 promissory notes, or whatever number of the said notes may remain unpaid, * * * immediately due and payable, and * * * to collect the same, * * * and in case of forfeiture as aforesaid all work done and money expended by the said party of the first part shall inure to the party of the second part as liquidated damages, * * * and the said party * * * may thereupon * * * enter upon said premises and dispossess all persons occupying the same." *Held*, that such transaction, being a conditional sale of the material in the dumps, gave the owner alternative remedies for breach of the contract, and that, where he declared a forfeiture and took possession because of default in payment of notes, he could not also collect the notes maturing thereafter.

—Manson v. Dayton, 153 Fed. 258; Jarmuth v. Same, Id..... 82 C. C. A. 588

SATISFACTION.

See "Payment."

SCHOOLS AND SCHOOL DISTRICTS.

Issues raised by pleadings in action on school district bonds, see "Pleading," § 2.

Subject and title of statute relating to school district bonds, see "Statutes," § 2.

§ 1. Public schools.

Act Neb. Feb. 26, 1879 (Laws 1879, p. 170) as amended by Act March 31, 1887 (Laws 1887, p. 597, c. 76), which authorizes school districts to issue bonds "to purchase a site for, or erect a school house, or houses, or for furnishing the necessary furniture or apparatus for the same, or for all of these purposes," authorizes such issuance for either one or all of the purposes stated, and such bonds are not invalid because they recite that they were issued "for the purpose of building a schoolhouse" only.

—School Dist. No. 11, Dakota County, Neb., v. Chapman, 152 Fed. 887 82 C. C. A. 35

Where bonds of a school district in Nebraska payable to bearer contained recitals that they were issued for a certain purpose "and in pursuance of" a certain statute, which authorized their issuance for such purpose, and also bore a certificate of the state Auditor of Public Accounts that they were duly registered, and another by that officer and the Secretary of State showing that they were issued pursuant to law, as required by the statute, evidence that such bonds were purchased before their maturity in New York in the regular course of business by a dealer in such securities at practically their face value, and in reliance on such recitals and certifi-

Digitized by Google

cates, is sufficient to sustain a finding that he was an innocent purchaser for value, and entitled to protection as such.

—School Dist. No. 11, Dakota County, Neb., v. Chapman. 152 Fed. 887 82 C. C. A. 35

Bonds of a Nebraska school district were sold by a banker in New York, and bore certificates of registration and regularity by designated officers of the state, as required by the statute under which they were issued. The purchaser was told by the banker that a suit had been brought to enjoin such registration and certification, but that it had been dismissed, and the banker produced the bonds bearing certificates by such officers of due registration and regularity. In fact the suit had not been dismissed, and it subsequently resulted in the granting of a permanent injunction as prayed for. *Held*, that such facts sustained a finding that the purchaser was not chargeable with actual notice of the pendency of the suit.

—School Dist. No. 11, Dakota County, Neb., v. Chapman, 152 Fed. 887 82 C. C. A. 35

A purchaser of negotiable bonds issued by a school district, which are regular on their face and bear the certificates of state officers that they were issued pursuant to statutory authority, is not chargeable with constructive notice of a pending suit to contest the election at which the bonds were authorized, brought under a general statute of the state authorizing suits to contest the election of any person to office, or the adoption of any proposition submitted to a vote of the people, but containing no provision for superseding the result of any election as declared by the canvassers pending such a suit; nor is such a purchaser chargeable with constructive notice of a temporary injunction granted in such suit restraining the issuance of the bonds, they having been in fact issued in due form.

—School Dist. No. 11, Dakota County, Neb., v. Chapman. 152 Fed. 887 82 C. C. A. 35

SECRET PROCESSES.

Right to monopoly in control of, see "Monopolies," §§ 1, 2.

SET-OFF AND COUNTERCLAIM.

§ 1. Subject-matter.

A contractor for a government work in Ohio canceled the contract of subcontractors for an alleged breach, and took possession of the tools and materials of the subcontractors on the premises under a provision of the contract, and used the same in completing the work. The subcontractors, who were citizens of another state, having brought an action in replevin for such tools and materials in a federal court, the defendant therein filed a counterclaim for damages growing out of the breach of contract by the plaintiffs. *Held*, that such claim for damages was one "arising out of the contract or transaction set forth in the petition, as the foundation of the plaintiff's claim, or connected with the subject of the action," in such sense as to make it a proper counterclaim under Rev. St. Ohio 1906, § 5069, and therefore that the court had authority under section 5089 to order it docketed as a separate action, and had jurisdiction over the subject-matter and the persons of the defendants therein.

—Baer v. Sleicher, 153 Fed. 129.....82 C. C. A. 281

SETTLEMENT.

See "Payment."
Of bill of exceptions, see "Exceptions, Bill of," § 1.

Digitized by Google

SHIPPING.

See "Collision"; "Maritime Liens"; "Towage"; "Wharves."

§ 1. Liabilities of vessels and owners in general.

In a suit by a stevedore's employé to recover from a vessel for a personal injury caused by the falling of a hatch cover, precipitating him into the hold, it was shown that, when in the course of his duty he went to remove the cover which had been closed by the vessel, or by those for whom she was responsible, he was not warned of any danger; that he went upon the hatch, when, without fault or negligence on his part or on the part of his fellow laborers, the supports immediately collapsed without apparent cause. *Held*, that such evidence was sufficient to make a prima facie case, which, unless overcome by countervailing evidence, entitled him to recover.

—Frederick Leyland & Co. v. Holmes, 153 Fed. 557..82 C. C. A. 511

The owners of a vessel owe a personal duty to the members of a stevedore's gang employed to work thereon to provide reasonable security against danger to life or limb, and to warn them of any latent danger caused by the ship, or for which the ship is responsible.

—Frederick Leyland & Co. v. Holmes, 153 Fed. 557..82 C. C. A. 511

The owner of a vessel which was seaworthy and properly equipped is not liable, under the admiralty law, for an injury to a stevedore's employé caused by the negligence of himself or other employés handling the hatch coverings when discharging the vessel.

—Bettis v. Frederick Leyland & Co., 153 Fed. 571....82 C. C. A. 525

Evidence *held* not to sustain the allegations of a libel, that an injury to libelant resulted from a defect in the fittings of a vessel, in view of the rule that a libelant in such case must establish his claim with reasonable certainty.

—Johnson v. Frederick Leyland & Co., 153 Fed. 572..82 C. C. A. 526

§ 2. Carriage of goods.

Under a contract of affreightment to carry wheat to the port of New York and there deliver it on board a vessel for export, where the wheat on reaching that port was loaded into a canal boat for transport and delivery to the designated vessel by the carrier's tug, the carrier is liable for its loss through the sinking of the canal boat, whether resulting from unseaworthiness or from the negligence of the towing tug or of the master of the boat; its seaworthiness not being affirmatively shown.

—Bradley v. Lehigh Valley R. Co., 153 Fed. 350....82 C. C. A. 426

A carrier by water can only avail himself of the exemptions from liability for errors of management and navigation provided by Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], by affirmative proof that the vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so, and such affirmative proof cannot be supplied by inferences or presumptions.

—Bradley v. Lehigh Valley R. Co., 153 Fed. 350....82 C. C. A. 426

A decree dismissing a libel to recover for damage to cargo affirmed where the evidence left it uncertain whether the damage was caused by sea water or by sweat and heat, and the bill of lading exempted the vessel from liability for injury caused by perils of the sea or from sweat or decay.

—The Folmina, 153 Fed. 364.....82 C. C. A. 440

Under a bill of lading which exempts the vessel from liability for injury to cargo through perils of the sea, where damage was caused by sea water, the burden rests on the vessel to show sufficient stress of weather to warrant the inference that such water found access to the cargo through a peril of the sea.

—The Folmina, 153 Fed. 364.....82 C. C. A. 440

Digitized by Google

A steamship originally constructed for passengers, but later used for the carriage of goods, had ports in the lower between-decks, which were submerged when she was fully loaded. These were equipped with glass bull's-eyes, and shutters for properly closing the same. On commencing to load cargo at Batoum the ports in a compartment were examined and found properly closed, and the compartment was then partially filled with wool. The vessel stopped at a number of other ports on the Black Sea and the Mediterranean, and took on more cargo; the hatchway leading to such compartment being used, and finally closed when she started on the voyage for New York. Shortly afterward water was discovered in the hold under such compartment, and on examination it was found that one of the glass bull's-eyes had been stolen, and that the water had entered through such port and damaged the cargo. The brass pins holding the bull's-eyes in a number of the other ports had also been removed. No inspection of the ports had been made after the loading commenced at Batoum. *Held*, that due diligence on the part of the owners to render the vessel seaworthy when she commenced the voyage required that such inspection should have been made the last thing before access to the ports was cut off, and that the damage to cargo was due to unseaworthiness for which the vessel was liable.

—The Tenedos, 151 Fed. 1022.....82 C. C. A. 671

If a ship starts on a voyage with a port negligently left open, causing damage to cargo, her owners are liable for failing to provide a ship seaworthy at the beginning of the voyage, and are not protected by section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), on the ground that the fault was one in navigation or the management of the vessel, although proper appliances for closing the ports were furnished; and this rule is especially applicable where the ports were so located as to be submerged when the vessel was fully loaded.

—The Tenedos, 151 Fed. 1022.....82 C. C. A. 671

SIGNALS.

From meeting vessels, see "Collision," § 1.

SMUGGLING.

See "Customs Duties," § 4.

SOCIETIES.

See "Associations."

SPECIFIC PERFORMANCE.

Apportionment of costs, see "Costs," § 1.

§ 1. Nature and grounds of remedy in general.

Complainant procured an option from defendant K. in consideration of $1,000, to purchase a cross-tie camp and outfit, together with certain growing timber, for $6,923.57, whereupon complainant gave a similar option to defendant lumber company to purchase the same outfit for $14,295. Defendant K. thereafter refused to perform his option to plaintiff, but sold the outfit direct to the lumber company, by which plaintiff alleged that he lost a net profit of $6,371.43. *Held*, that in the absence of any allegation that either K. or the lumber company were insolvent, com-

Digitized by Google

plainant had an adequate remedy at law, and was not entitled to compel specific performance of his option.
—Marthinson v. King, 150 Fed. 48.....82 C. C. A. 360

The granting of specific performance is not a matter of arbitrary discretion, but of judicial discretion controlled by principles of equity exercised on consideration of all the circumstances of the particular case.
—Marthinson v. King, 150 Fed. 48.....82 C. C. A. 360

§ 2. **Contracts enforceable.**
Where an owner of property gives another a written option for a valuable consideration, agreeing to sell it to him at a fixed price if accepted within a specified time, such option is binding on the owner and on a purchaser from him, with knowledge thereof, and in a proper case may be specifically enforced.
—Marthinson v. King, 150 Fed. 48.....82 C. C. A. 360

STATES.

Courts, see "Courts."

STATUTES.

Provisions relating to particular subjects.

See "Appeal and Error," § 3; "Bankruptcy"; "Carriers," § 1; "Collision," § 4; "Commerce," §§ 1, 2; "Conspiracy," § 1; "Corporations," § 2; "Courts," § 2; "Criminal Law," §§ 3, 4; "Customs Duties"; "Death," § 1; "Equity," § 3; "Exceptions, Bill of," § 1; "Habeas Corpus," § 1; "Jury," § 1; "Maritime Liens," § 1; "Master and Servant," § 1; "Monopolies," §§ 1, 2; "Patents," § 2; "Perjury," § 1; "Property"; "Railroads," §§ 2, 3; "Schools and School Districts," § 1; "Set-Off and Counterclaim," § 1; "Shipping," § 2; "Street Railroads," § 1; "Trial," § 5; "Trusts," § 1; "Wills," § 1.
Revenue laws, see "Internal Revenue."
Statute of frauds, see "Frauds, Statute of."
Vendor's lien on land sold, see "Vendor and Purchaser," § 3.

§ 1. **Enactment, requisites, and validity in general.**
The provision of Const. Neb. art. 3, § 11, requiring every bill to be read in each house on three different days, as construed by the Supreme Court of the state, does not make it necessary that there shall be three readings of a bill in the house in which it originated, and by which it has been duly passed, on its return for concurrence in an amendment adopted by the other house.
—School Dist. No. 11, Dakota County, Neb., v. Chapman, 152 Fed. 887 82 C. C. A. 35

Where a legislative act as enrolled and authenticated bore the same title as the bill when introduced, and the journals contain no affirmative statement that the title was at any time changed or amended, the act is not invalidated by the fact that in the journal entries relating to the bill during its passage it is sometimes identified by an abbreviated title and its number.
—School Dist. No. 11, Dakota County, Neb., v. Chapman, 152 Fed. 887 82 C. C. A. 35

Under the Nebraska decisions, an act of the Legislature is not invalidated because the journal of the house in which the bill originated is silent in respect to its concurrence in an amendment by the other house which appears in the act as enrolled and signed.
—School Dist. No. 11, Dakota County, Neb., v. Chapman, 152 Fed. 887 82 C. C. A. 35

The provision of Const. Neb. art. 3, § 10, requiring the yeas and nays on the final passage of a bill by the Legislature to be entered on the

Digitized by Google

journal of each house, as construed by the Supreme Court of the state, does not apply to a vote of concurrence by either house in an amendment adopted by the other, but only to the vote on the passage of the bill following its third reading in each house, which is treated as the vote on its final passage.

—School Dist. No. 11, Dakota County, Neb., v. Chapman, 152 Fed. 887 82 C. C. A. 35

§ 2. Subjects and titles of acts.

Act Neb. March 31, 1887 (Laws Neb. 1887, p. 597, c. 76), is entitled "An act to amend 'An act to provide for the issuing and payment of school district bonds' approved February 26. A. D. 1879, being subdivision 15 of chapter 79, Revised Statutes." The only preceding Revised Statutes were those of 1866, which being prior to the passage of the original act did not contain the same, but it constituted subdivision 15 of chapter 79 of the Compiled Statutes of 1881, and such Compiled Statutes were named in the body of the amendatory act. *Held*, that the obvious error in the title did not produce any uncertainty as to the subject of the amendatory act such as to render it invalid as in violation of the constitutional mandate that the subject of a bill shall be clearly expressed in its title.

—School Dist. No. 11, Dakota County, Neb., v. Chapman, 152 Fed. 887 82 C. C. A. 35

§ 3. Amendment, revision, and codification.

Under the rule of decision in Nebraska, an amendment of a prior law, coupled with a formal repeal of such law, does not operate as a repeal of the original act in a constitutional sense, but continues it in effect in its amended form, and a subsequent amendatory act is not void because it refers to and purports to amend the original and not the amended act.

—School Dist. No. 11, Dakota County, Neb., v. Chapman, 152 Fed. 887 82 C. C. A. 35

The provision of Const. Neb. art. 3, § 11, that "no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed," does not require that the purpose to repeal the original sections shall be expressed in the title of the amendatory act, nor is an amendatory act void, where it correctly recites the sections amended, because in the repealing clause there is an obvious error in giving the number of the chapter containing such sections.

—School Dist. No. 11, Dakota County, Neb., v. Chapman, 152 Fed. 887 82 C. C. A. 35

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Art. 1, § 9, par. 5 136

STATUTES AT LARGE.

1789, Sept. 24, ch. 20, § 30, 1 Stat. 88 324
1878, June 3, ch. 151, § 1, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545] 181
1886, Aug. 2, ch. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228]. Amended by Act 1902, May 9, ch. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1905, p. 432] 349
1887, Feb. 4, ch. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154] .. 135
1887, Feb. 4, ch. 104, §§ 1, 2, 3, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155] 615
1887, Feb. 4, ch. 104, § 14, 24 Stat. 384. Amended by Act 1889, March 2, ch. 382, § 4, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3165] 615
1889, March 2, ch. 382, § 4, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3165] 615
1890, July 2, ch. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] .. 158, 159
1891, March 3, ch. 517, § 11, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552] 73, 232
1893, Feb. 13, ch. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946] 426, 671
1895, Feb. 8, ch. 64, § 1, 28 Stat. 645 [U. S. Comp. St. 1901, p. 2891] 562
1897, July 24, ch. 11, § 1, Schedule C, par. 137, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639] 201

Digitized by Google

1897, July 24, ch. 11, § 1, Schedule G, pars. 241, 257, 30 Stat. 170, 171 [U. S. Comp. St. 1901, pp. 1649, 1650] 608, 626
1897, July 24, ch. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651] 627
1897, July 24, ch. 11, § 1, Schedule G, pars. 269, 270, 30 Stat. 172 [U. S. Comp. St. 1901, pp. 1651, 1652] 656
1897, July 24, ch. 11, § 2, Free List, par. 568, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1684] 629
1898, July 1, ch. 541, § 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422] 109, 208
1898, July 1, ch. 541, § 6, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424] 232
1898, July 1, ch. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]. Amended by Act 1903, Feb. 5, ch. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684] 439
1898, July 1, ch. 541, § 21, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430] 232
1898, July 1, ch. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432] 438
1898, July 1, ch. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432] 232, 438
1898, July 1, ch. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445] 91, 99, 516
1898, July 1, ch. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445] 114
1898, July 1, ch. 541, § 64b (5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448] 531
1898, July 1, ch. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449] 91, 92
1898, July 1, ch. 541, § 70a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3452] 232
1899, March 3, ch. 425, § 15, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543] 332
1902, May 9, ch. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1905, p. 432] 349
1903, Feb. 5, ch. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684] 439
1903, Feb. 19, ch. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599] 135

REVISED STATUTES.

§ 649 [U. S. Comp. St. 1901, p. 525] 36, 520
§ 700 [U. S. Comp. St. 1901, p. 570] 615
§§ 723, 858 [U. S. Comp. St. 1901, pp. 583, 659] 572
§ 862 [U. S. Comp. St. 1901, p. 661] 324
§ 914 [U. S. Comp. St. 1901, p. 684] 408
§ 953 [U. S. Comp. St. 1901, p. 696] 609
§ 961 [U. S. Comp. St. 1901, p. 699] 403
§ 997 [U. S. Comp. St. 1901, p. 712] 74
§ 1008 [U. S. Comp. St. 1901, p. 715] 337
§ 1419 [U. S. Comp. St. 1901, p. 1007] 659
§ 3176 [U. S. Comp. St. 1901, p. 2068] 349
§ 4887 [U. S. Comp. St. 1901, p. 3382] 629
§ 5440 [U. S. Comp. St. 1901, p. 3676] 48, 49
§ 5467 [U. S. Comp. St. 1901, p. 3691] 505

COMPILED STATUTES 1901.

Page 525 ..... 36, 520
Page 552 ..... 73, 232
Page 570 615
Pages 583, 659 572
Page 661 324
Page 684 408
Page 696 609
Page 699 403
Page 712 74
Page 715 337
Page 1007 659
Page 1545 181
Page 1639 201
Pages 1649, 1650 ..... 608, 626
Page 1651 ..... 627, 656
Page 1652 656
Page 1684 629
Pages 2068, 2228 349
Page 2891 562
Page 2946 ..... 426, 671
Page 3154 135
Pages 3155, 3165 615
Page 3200 ..... 158, 159
Page 3382 629
Page 3422 ..... 109, 208
Page 3424 232
Page 3427 439
Page 3430 232
Page 3432 ..... 232, 438
Page 3445 ..... 91, 99, 114, 516
Page 3448 531
Page 3449 ..... 91, 92
Page 3452 232
Page 3543 332
Page 3676 ..... 48, 49
Page 3691 505

COMPILED STATUTES SUPP. 1905.

Page 432 349
Page 599 135
Page 684 439

COLORADO.

MILLS' ANNOTATED STATUTES.

§§ 2133, 2562, 2563 232

GEORGIA.

CIVIL CODE 1895.

§ 3045 361

IDAHO.

REVISED STATUTES 1887.

§§ 3225, 3440, 4520, 4521 482

Digitized by Google

KANSAS.

GENERAL STATUTES 1901.

§§ 7875, 7880, 7882..... 413

KENTUCKY.

STATUTES 1903.

§§ 2487, 2492, 2494, 2495..... 531

MASSACHUSETTS.

REVISED LAWS 1902.

Ch. 112, § 23..... 309

MISSOURI.

ANNOTATED STATUTES 1906.

§§ 596, 604, 605..... 408

REVISED STATUTES 1899.

§§ 596, 604, 605 [Ann. St. 1906, pp. 622, 631, 635]..... 408

NEBRASKA.

CONSTITUTION.

Art. 3, §§ 10, 11..... 35

COMPILED STATUTES 1881.

Ch. 79, subd. 15..... 35

COMPILED STATUTES 1901.

§§ 2503, 2504..... 29

LAWS.

1879, p. 170. Amended by Laws 1887, p. 597, ch. 76..... 36

1887, p. 597, ch. 76.....35, 36

NEW JERSEY.

LAWS.

1896, p. 284, ch. 185, § 21..... 421

1896, p. 293, ch. 185, § 49..... 422

NEW YORK.

1892, p. 1394, ch. 676, § 53..... 330

NORTH CAROLINA.

REVISAL 1905.

§ 620 216

OHIO.

REVISED STATUTES 1892.

§ 3300 447

REVISED STATUTES 1906.

§§ 5069, 5089 281

SOUTH CAROLINA.

CIVIL CODE 1902.

§ 2135 65

TENNESSEE.

LAWS.

1903, p. 520, ch. 237..... 87

STIPULATIONS.

Waiving jury, see "Jury," § 1.

STOCKHOLDERS.

Of corporations, see "Corporations," § 2.

STREET RAILROADS.

§ 1. Establishment, construction, and maintenance.

Rev. Laws Mass. 1902, c. 112, § 23, requiring a street railroad company before issuing mortgage bonds to obtain authority therefor from the state board of railroad commissioners, which may be granted only after a hearing and examination into the assets and liabilities of the company, and upon being satisfied that its property exclusive of its franchise equals or exceeds its indebtedness, embodies a rule of public policy which cannot be ignored nor overridden by the courts.

—Augusta Trust Co. v. Federal Trust Co., 153 Fed. 157..... 82 C. C. A. 309

Digitized by Google

A provision in notes, given by a Massachusetts street railroad company, by which it agreed to issue to the holder as security certain of its bonds secured by a mortgage previously executed, as soon as a further issue of bonds thereunder should be authorized by the state railroad commissioners, whose authority was necessary before they could be legally issued under Rev. Laws Mass. 1902, c. 112, § 23, does not place the notes on an equality with bonds previously issued, nor entitle the holders to any preference over general creditors where no further issue of bonds was authorized, and the company has become insolvent and is in the course of administration, although the circumstances were such as to create an equitable lien as between the parties which the courts would enforce in the absence of the statute.
—Augusta Trust Co. v. Federal Trust Co., 153 Fed. 157..... 82 C. C. A. 309

SURETYSHIP.

See "Principal and Surety."

TAXATION.

See "Internal Revenue."
Mandamus to compel city to levy taxes, see "Municipal Corporations," § 2.

TERMINATION.

Of lease, see "Landlord and Tenant," § 1.

TERMS.

Of leases, see "Landlord and Tenant," § 1.
Of patents, see "Patents," § 2.

TESTAMENT.

See "Wills."

TIME.

For filing bill of exceptions, see "Exceptions, Bill of," § 1.
For taking appeal or suing out writ of error, see "Appeal and Error," § 3; "Criminal Law," § 6.

TITLE.

Mining contract as cloud on title, see "Mines and Minerals," § 1.
Of statutes, see "Statutes," §§ 1, 2.

TORTS.

See "Negligence."
Causing death, see "Death," § 1.
Maritime torts, see "Collision."
Of employés, see "Master and Servant," § 2.
Of owners of vessels, see "Shipping," § 1.

Digitized by Google

TOWAGE.

A towing tug is not an insurer of its tow, and is bound only to the exercise of a reasonable degree of care and skill in the work undertaken.
—The Oak, 152 Fed. 973; The Dauntless, Id.....82 C. C. A. 327

A finding affirmed that the sinking of a barge, which was first in a tow of five, on a voyage from Baltimore to Norfolk, while passing into Hampton Roads through the Swash Channel, was not due to her grounding or to any fault of the tug, but to her unseaworthiness and inability to stand the strain as leading tow, where she was placed at the request of her master; it being shown that the master of the tug was a competent and careful navigator, that he took the usual channel, and that the tug and other tows which were of equal or greater draft passed safely.
—The Oak, 152 Fed. 973; The Dauntless, Id.....82 C. C. A. 327

Evidence considered, and *held* to establish the contention of a libelant that a collision between a steamship and a dry dock from which the ship was being towed by a tug was due to the fault of the tug in hauling the stern too far to port and against the side of the dock, because of a miscalculation of the effect of a high wind blowing from that side.
—The Ferguson, 153 Fed. 366.....82 C. C. A. 442

TOWNS.

See "Municipal Corporations."
Conclusiveness of judgment in action on township railroad aid bonds, see "Judgment," § 1.
Enforcement of judgment in action on township railroad aid bonds, see "Judgment," § 2.

TRADE-MARKS AND TRADE-NAMES.

Sale under, as exemption from rules against restraint of trade, see "Monopolies," § 2.

§ 1. Infringement and unfair competition.
Complainant manufactured and sold a patent medicine made from herbs, which since 1888 had been known and widely advertised as "Alpenkrauter." After its sale became successful, defendants advertised a similar remedy under the name "St. Bernard Alpen Krauter." *Held*, that defendants' use of such term constituted unfair competition.
—Dr. Peter H. Fahrney & Sons Co. v. Ruminer, 153 Fed. 735.....
82 C. C. A. 621

Complainant and its predecessors since 1888 manufactured and widely advertised and sold a patent medicine, called "Alpenkrauter," as a blood purifier, claimed to cure a great number of diseases, which in fact it did not do. The public was cautioned not to consult physicians nor druggists, because the medicine was not for sale there, and, while it claimed that the medicine was composed in part of imported herbs, complainant's witness refused before the master to disclose the ingredients of the medicine or to state from what herb houses or firms the herbs were purchased. *Held*, not to show that complainant did not come into equity with clean hands, and was therefore not entitled to relief against defendants' unfair competition by the sale of another medicine under a similar name.
—Dr. Peter H. Fahrney & Sons Co. v. Ruminer, 153 Fed. 735.....
82 C. C. A. 621

In a suit to enjoin further use of the name of defendants' patent medicine as unlawful competition, complainant's inexcusable laches was not

Digitized by Google

a defense to its right to an injunction restraining defendants' future misconduct.
—Dr. Peter H. Fahrney & Sons Co. v. Ruminer, 153 Fed. 735..... 82 C. C. A. 621

TRADE SECRETS.

Right to monopoly in control of, see "Monopolies," §§ 1, 2.

TRANSCRIPTS.

Of record for purpose of review, see "Criminal Law," § 6.

TREES.

As real property, see "Property."

TRESPASS.

Injuries to trespassers, see "Railroads," § 3.

TRIAL.

See "Witnesses."

Proceedings incident to trials.

Right to trial by jury, see "Jury," § 1.

Trial of actions by or against particular classes of persons.

See "Railroads," § 3.

Trial of particular civil actions or proceedings.

See "Negligence," § 2.
For death caused by operation of railroad, see "Railroads," § 3.
For death of servant, see "Master and Servant," § 1.
For personal injuries, see "Electricity"; "Master and Servant," §§ 1, 2.
Suits in admiralty, see "Collision," § 6.

Trial of criminal prosecution.

See "Criminal Law," § 4.

§ 1. Reception of evidence.

Where, when a witness testifies in person at the trial, and not by deposition, certain questions asked of him are in proper form, relevant, and admit of favorable answers on behalf of the party propounding them, the sustaining of an objection thereto constitutes error, though there is no offer to show the substance of the proposed testimony; no offer being required by the court.
—Stanley v. Beckham, 153 Fed. 152.....82 C. C. A. 304

In an action for broker's services, defendant sought, on cross-examination of plaintiff, to prove an agreement to accept an employment and certain stock, in full for his services; but this, on objection, was excluded as not proper cross-examination, as being matter of defense. As a part of the defense, one of defendant's witnesses testified that, after the services had been rendered, plaintiff in a stated conversation, accepted as full compensation a position as salesman and defendant's agreement to carry for him, on certain terms, certain capital stock of a corporation. *Held,*

Digitized by Google

that it was error, after the admission of such evidence, to refuse to permit plaintiff in rebuttal to give his version of such conversation, though plaintiff had previously in such cross-examination, testified to certain phases thereof.

—Stanley v. Beckham, 153 Fed. 152.....82 C. C. A. 304

§ 2. Taking case or question from jury.

It is undoubtedly true that cases are not lightly to be withdrawn from the jury, and that ordinarily negligence is so far a question of fact that it should be submitted to and determined by them; but it is equally true that when the evidence and the inferences to be reasonably drawn from it are undisputed, or are of such conclusive character that the exercise of a sound judicial discretion would permit the court to give effect to but one verdict, the case may and should be withdrawn from the jury and a verdict directed for the plaintiff or the defendant, as the one or the other may be proper.

--St. Louis & S. F. R. Co. v. Dewees, 153 Fed. 56....82 C. C. A. 190

§ 3. Instructions to jury.

Plaintiff was employed to get information with reference to the contemplated purchase of a grocery business for defendant, and to obtain a statement from the prospective sellers showing the volume of their business, amount of capital used, merchandise usually carried, salaries paid, profits realized, etc., but was expressly charged not to disclose his principal's name. On beginning negotiations, the sellers declined to make any statement, unless informed concerning plaintiff's principal, whereupon he disclosed defendant's name and obtained the required information, shortly after which defendant authorized the disclosure of his name, and then completed the negotiations himself, expressing satisfaction with plaintiff's efforts. *Held*, that, as applied to this evidence, in an action for plaintiff's commissions, it was error to charge that a broker, in order to show himself entitled to commissions, must faithfully carry out the instructions given by the principal, and has no right to depart substantially therefrom.

—Stanley v. Beckham, 153 Fed. 152.....82 C. C. A. 304

In an action for damages caused by the collapse of a building during alteration, plaintiff alleged noncompliance with an ordinance requiring the issuance of a building permit before the building alterations were commenced. Defendant sought to prove what had been done with reference to securing a permit before the commencement of the work, but the court sustained plaintiff's objection, and stated that he did not see how the permit was material; that in the view he took of the case it would go to the jury on the single proposition whether the work was done in a negligent manner. The matter was not again referred to, but the court charged that in determining whether defendants were negligent the jury might consider the fact that the city ordinances required a permit to be obtained, the fact that one was not obtained, and whether the omission contributed to the injury. *Held*, that such instruction submitted an issue on which defendant had not been heard, and was erroneous.

—Western Real Estate Trustees v. Hughes, 153 Fed. 560.....
82 C. C. A. 514

§ 4. Verdict.

A verdict may be amended with reference to both matters of form and substance during the term, either by reference to the judge's notes taken at the trial, or by other satisfactory evidence.

—Miller v. Steele, 153 Fed. 714.....82 C. C. A. 572

A petition, in an action against a legatee on an express contract between plaintiff and testator for plaintiff's services, alleged that testator died December 29, 1901, and prayed judgment for $21,000 and interest from that date. The jury returned a verdict finding the issues in favor of plaintiff and awarding her $21,000 and interest. *Held* that, the date of testator's breach of contract being fixed by his death, the court was justi-

Digitized by Google

fied in amending the verdict during the term by adding interest from that date.
—Miller v. Steele, 153 Fed. 714.....82 C. C. A. 572

§ 5. **Trial by court.**
Where an action at law in a federal court is tried to the court without a jury, by stipulation pursuant to Rev. St. § 649 [U. S. Comp. St. 1901, p. 525], which provides that in such case the finding may be either general or special, whether such finding shall be general or special rests in the discretion of the court, and its refusal to make special findings is not subject to review.
—School Dist. No. 11, Dakota County, Neb., v. Chapman, 152 Fed. 887.....82 C. C. A. 35

Special findings by a trial judge in an action at law in a federal court, where a jury has been waived pursuant to the provisions of Rev. St. § 649 [U. S. Comp. St. 1901, p. 525], have the same effect as special verdicts of a jury, and must embrace a finding on every material issue joined in the case, otherwise the result is a mistrial.
—Towle v. First Nat. Bank of Boston, 153 Fed. 566..82 C. C. A. 520

§ 6. **Waiver and correction of irregularities and errors.**
The denial of a request for a finding in favor of a defendant, in the nature of a directed verdict, made at the close of plaintiff's evidence, and an exception to such denial, are waived by the subsequent introduction by defendant of evidence in its own behalf.
—School Dist. No. 11, Dakota County, Neb., v. Chapman, 152 Fed. 887.....82 C. C. A. 35

An exception to the ruling of the court denying a motion to direct a verdict for defendant, made at the close of plaintiff's evidence, is not waived, where the defendant does not thereafter introduce any evidence, and a formal announcement that he rests his case is not necessary.
—Kinnear Mfg. Co v. Carlisle, 152 Fed. 933.....82 C. C. A. 81

TRUSTEES.

As person concluded by judgment, see "Judgment," § 1.
In bankruptcy, see "Bankruptcy," §§ 2, 4.

TRUSTS.

Combinations to monopolize trade, see "Monopolies," § 2.

§ 1. **Creation, existence, and validity.**
Gen. St. Kansas 1901, § 7875, which provides that no trust concerning lands, except such as arises by implication of law, shall be created, unless in writing, etc., does not prevent a complainant from showing by parol that real estate conveyed to defendant was in part paid for by others, together with other tracts, and that the conveyance was pursuant to an agreement made in good faith between the purchasers that defendant should hold the same in trust for the benefit of the one to whom it should be allotted in a division; the trust in such case being one arising by implication of law under sections 7880 and 7882 of the statute as construed by the Supreme Court of the state.
—Freeman v. Freeman, 153 Fed. 337.....82 C. C. A. 413

In a suit by heirs to recover a lot, the title to which was alleged to be held in trust by defendant for the benefit of their decedent, it was shown that he and his family, consisting of his parents, two brothers, and a sister, the defendant, from time to time during a number of years had purchased lots and other real estate with the intention of holding the same in partnership until a division was made. All contributed to the payment

Digitized by Google

of the purchase money, except perhaps the defendant, and toward paying off incumbrances. The title to all of the property was vested in the father and in defendant, who was unmarried and lived with her parents. The father, having reached an advanced age, conveyed the property standing in his name, including the lot in controversy, to defendant, as the evidence tended to show, on an agreement and understanding that she should hold the same in trust for the benefit of all until a division should be made. This deed was not recorded, but was known to the others. The sons having removed to a distance, defendant looked after the property and received and applied the remittances made by her brothers. After some correspondence respecting a division, she caused a deed to be executed to the decedent by her parents, conveying to him the lot in controversy, subject to a life estate in the grantors, which deed the decedent accepted as satisfactory. A few days afterward, and before his deed was recorded, he was killed, and defendant thereupon recorded her prior deed and claimed the property. *Held*, that such evidence, including the corroborative facts which were undisputed, was sufficient to raise an implied trust which entitled complainants to a conveyance of the lot from defendant, subject only to a life interest in her parents.

—Freeman v. Freeman, 153 Fed. 337.....82 C. C. A. 413

TUGS.

See "Towage."

UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 1.

UNITED STATES.

Arrest of judgment in prosecution for conspiracy to defraud the United States of public lands, see "Criminal Law," § 5.
Conspiracy to defraud, see "Conspiracy," § 1.
Courts, see "Courts," § 2; "Removal of Causes."
Exercise of power of eminent domain, see "Eminent Domain," § 1.
Liabilities of sureties on bonds of government contractors in general, see "Principal and Surety," § 1.

VALUE.

Limits of jurisdiction, see "Courts," § 2.

VENDOR AND PURCHASER.

See "Sales."
Sale by trustee in bankruptcy, see "Bankruptcy," § 4.
Sale of railroad, see "Railroads," § 2.
Specific performance of contract, see "Specific Performance."

§ 1. **Requisites and validity of contract.**

Defendant, having agreed to purchase an interest in certain mining claims, at a meeting of all the parties stated to plaintiff that he would sign the contract on its receipt from his agent, L. Defendant proceeded under the contract as though it had been signed by all the parties, made payments under it, went into possession of the property, participated in its development as though the contract had been executed, and on the trial refused to produce the original on notice. *Held* to warrant an inference,

Digitized by Google

in the absence of evidence to the contrary, that defendant in fact signed the contract.
—Ferguson v. Blood, 152 Fed. 98.....82 C. C. A. 482

§ 2. **Modification or rescission of contract.**
Complainant, having purchased a lead and zinc mine in July, 1902, discovered in April, 1903, that its agent had been corrupted by the vendors, and that complainant had been induced to pay $7,000 more for the mine than the owners deemed it worth. With this knowledge, complainant brought suit to recover the amount alleged to have been wrongfully paid to its agent and made a claim against the vendors for the overpayment, but no notice of rescission for fraud was given to the vendors until August, 1904, and suit was not brought for such relief until September of that year, during which time complainant treated the mine as its own and operated the same changing the status of the parties and condition of the property in such a manner as to disclose a purpose to waive the fraud and affirm the sale. *Held*, that complainant was not entitled to a decree for rescission.
—Old Colony Zinc & Smelting Co. v. Carrick, 153 Fed. 173.....
82 C. C. A. 347

§ 3. **Remedies of vendor.**
By one of three separate instruments, executed on the same day, complainant conveyed certain real estate to an individual; the latter, by the second, conveyed it to a corporation, while, by the third, which was between complainant and such corporation, said conveyances were recited, and provision was made for deferred payments of the purchase money. Each provided expressly that the grantee should not sell or incumber the property during the ensuing five years, which was the time given by the third for payment of the purchase money in full. The instruments each described the property, and were so executed as to be entitled to record, and all were recorded in the county where the land was situated. The purchasing corporation, after having made the first of the deferred payments, was adjudicated a bankrupt, and its interest in the property was sold by its trustee subject to all valid existing liens; the purchaser having actual notice of one at least of said instruments. *Held*, that they were to be construed as a single instrument, and gave the complainant a lien upon the property for the unpaid purchase money which was enforceable in equity as against the purchaser.
—Portland Chemical & Phosphate Co. v. Blodgett, 152 Fed. 929....
82 C. C. A. 77

Where a seller of an interest in certain mining claims retained title to the buyer's interest to secure payment of the price, the vendor was entitled to foreclose the lien so retained on the purchaser's default, as provided by Rev. St. Idaho 1887, §§ 3440, 4520, and 4521, and to recover a a deficiency judgment against the purchaser on the failure of his interest to sell for enough to satisfy the debt.
—Ferguson v. Blood, 152 Fed. 98.....82 C. C. A. 482

VENUE.

In criminal prosecutions, see "Criminal Law," § 2.

VERDICT.

Directing verdict in civil actions, see "Trial," §§ 2, 6.
In civil actions, see "Trial," § 4.

VICE PRINCIPALS.

See "Master and Servant," § 1.

Digitized by Google

VIS MAJOR.

Causing collision, see "Collision," § 4.

WAIVER.

Of objections at trial, see "Trial," § 6.
Of objections in criminal prosecutions, see "Criminal Law," § 4.
Of right to jury, see "Jury," § 1.
Of warranty of goods sold, see "Sales," § 4.

WARRANTY.

On sale of goods, see "Sales," § 4.

WHARVES.

A wharf built on the bank of a navigable river, not in a city or town where there are a number of others, but at the terminus of public highways in the country, or at a small place, where it constitutes the only means by which the people of the community can reach the river and use the mediums of commerce navigating the same, and which was built for such use, or is being so used, is impressed with a public interest; and a single carrier cannot, by purchasing or leasing the same, convert it into private property, so as to have the right to exclude the public or other carriers from using it for the loading or unloading of vessels on the payment of reasonable wharfage.
—Weems Steamboat Co. of Baltimore City v. People's Steamboat Co., 152 Fed. 1022.....82 C. C. A. 276

WILLS.

Amendment of verdict in action against legatee, see "Trial," § 4.

§ 1. Rights and liabilities of devisees and legatees.

An action in the federal court against a legatee in his lifetime, in which action only a money judgment without discovery or accounting was asked, was properly brought at law under Rev. St. § 723 [U. S. Comp. St. 1901, p. 583], declaring that suits in equity shall not be sustained in United States courts in any case where a plain, adequate, and complete remedy may be had at law.
—Miller v. Steele, 153 Fed. 714.....82 C. C. A. 572

In a suit against a legatee on testator's express contract to pay plaintiff for services rendered him, the court properly charged that the relation of the parties was a circumstance bearing on the probability of there being such a contract, and that, if the contract was not made, if plaintiff's relation to testator was that of his betrothed or future wife, and the services were rendered in that relation, she could not recover.
—Miller v. Steele, 153 Fed. 714.....82 C. C. A. 572

WITNESSES.

See "Evidence."
Perjury, see "Perjury."

Digitized by Google

§ 1. **Competency.**

Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], declaring that no witness shall be excluded because of interest, except that in actions by or against executors, administrators, or guardians neither party shall be allowed to testify against the other as to any transaction with or statement by testator, intestate, or ward, unless called to testify thereto by the opposite party, did not incapacitate plaintiff to testify in an action against a legatee for services rendered testator.

—Miller v. Steele, 153 Fed. 714.....82 C. C. A. 572

§ 2. **Examination.**

Where a witness of an accident by which a person was run over and killed by a railroad train, on his direct examination by the plaintiff in an action to recover damages for the death, testified generally to the situation and conditions surrounding the accident, and to certain acts of the decedent, the defendant was entitled on cross-examination to inquire in detail as to all the acts and conduct of decedent immediately preceding the accident.

—Fadley v. Baltimore & O. R. Co., 153 Fed. 514....82 C. C. A. 464

Where a witness is apprehensive that some wrong will be done to his personal or property rights, he may refuse to answer before a master any question propounded, and stand on such refusal until the question raised has been determined by the court.

—Dr. Peter H. Fahrney & Sons Co. v. Ruminer, 153 Fed. 735..... 82 C. C. A. 621

§ 3. **Credibility, impeachment, contradiction, and corroboration.**

It was not an abuse of discretion for the trial court to permit a witness on cross-examination to be asked, for the purpose of discrediting him, whether he had been drinking on the day of the injury and at the time of the trial.

—Armour & Co. v. Skene, 153 Fed. 241.....82 C. C. A. 385

WORDS AND PHRASES.

"And," see "Contracts," § 1.
"By any device whatever," see "Carriers," § 1.
"Continuing Crime," see "Criminal Law," § 2.
"Entries," see "Public Lands," § 1.
"Or," see "Contracts," § 1.
"Public Lands," see "Public Lands," § 1.

WRITS.

Particular writs.

See "Habeas Corpus"; "Injunction."
Writ of error, see "Appeal and Error."

YEAR.

Estates for years, see "Landlord and Tenant."

[END OF VOLUME.]

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google